

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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THE ROMAN CATHOLIC DIOCESE OF
BROOKLYN, NEW YORK,

Plaintiff,

-against-

GOVERNOR ANDREW M. CUOMO in
his official capacity,

Defendant.

: 20-CV-4844 (NGG)

: United States Courthouse
: Brooklyn, New York

: Thursday, October 15, 2020
: 2:00 p.m.

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TRANSCRIPT OF CIVIL CAUSE FOR PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE NICHOLAS G. GARAUFI
SENIOR UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S:

For the Plaintiff: GIBSON, DUNN & CRUTCHER, LLP
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New York, New York 10166

BY: RANDY MASTRO, ESQ.
WILLIAM J. MOCCIA, ESQ.
AKIVA SHAPIRO, ESQ.

For the Defendant: LETITIA JAMES
ATTORNEY GENERAL OF THE STATE OF NEW YORK
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New York, New York 10005
BY: SETH FARBER, ESQ.

Court Reporter: Linda A. Marino,
Official Court Reporter
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1 THE COURTROOM DEPUTY: This is a preliminary
2 injunction hearing.

3 Beginning with the Plaintiffs, please state your
4 appearances for the record.

5 Plaintiff?

6 MR. SHAPIRO: This is Akiva Shapiro from Gibson
7 Dunn. I believe Randy Mastro is on.

8 THE COURT: Mr. Mastro, state your appearance.
9 Where are you?

10 THE COURTROOM DEPUTY: He was just on. Now we lost
11 him.

12 THE COURT: Let's just wait a moment for him to
13 reappear.

14 (Pause in proceedings.)

15 MR. MASTRO: Hi.

16 THE COURT: Mr. Mastro, please state your
17 appearance.

18 MR. MASTRO: Certainly, your Honor. Randy Mastro,
19 of Gibson Dunn & Crutcher, along with my colleagues Akiva
20 Shapiro and William Moccia.

21 THE COURT: Just for the sake of seeing all of your
22 head, could you adjust the camera? It's disconcerting
23 otherwise.

24 MR. MASTRO: My head is big enough already, your
25 Honor.

1 Is this better?

2 THE COURT: It's somewhat better, yes. Books are
3 helpful to make the adjustment.

4 MR. MASTRO: There's a reason I went into the law:
5 Because I'm not that athletic.

6 I lost the video.

7 THE COURTROOM DEPUTY: I see you.

8 THE COURT: He lost his video.

9 I can hear you.

10 (Pause in proceedings.)

11 MR. FARBER: Your Honor, this is Seth Farber for the
12 Defendant. Unfortunately, I've been having connection
13 problems.

14 THE COURT: All right, Mr. Farber.

15 FEMALE SPEAKER: Can you see Randy now?

16 THE COURT: Yes, we can.

17 MR. MASTRO: Thank you. Sorry about the delay.

18 THE COURT: All right. So, we have Mr. Mastro and
19 co-counsel and Mr. Farber.

20 That's all counsel?

21 Mr. Farber, anyone else?

22 MR. FARBER: No, I'll be the only one appearing for
23 the Defendant today, your Honor.

24 THE COURT: Thank you very much, sir.

25 This is the case of the Roman Catholic Diocese of

1 Brooklyn against Governor Andrew Cuomo. The purpose of this
2 proceeding is to provide an evidentiary hearing in connection
3 with the Plaintiff's motion for preliminary injunction against
4 the Governor of the State of New York in connection with
5 limitations on religious worship in Catholic churches during
6 the COVID-19 pandemic under Executive Order 202.68.

7 So, let me just state how we're going to proceed
8 here. The Plaintiff has two witnesses, I understand, and the
9 Defendant has one witness. The Plaintiff has objected to the
10 Defendant's witness, and the Court has considered the
11 objection and overruled the objection.

12 So, we're going to proceed. And how we will proceed
13 is that we will take the Plaintiff's witnesses first and then,
14 depending on how much time has transpired, we'll take a break
15 and then take the Defendant's witness.

16 First, I'll indicate that I've reviewed all of the
17 papers that have been submitted by the parties. And my hope
18 is that we will complete all of the testimony this afternoon,
19 which will permit the Court to try to issue a decision before
20 the weekend. So, I wish to mention that that's my hope and my
21 objective.

22 Also, before we move into the testimony, let me
23 thank Judge Eric Komitee for handling the application for
24 temporary restraining order last Friday when I was not
25 available.

1 So, at this point, is there anything preliminary
2 prior to beginning hearing from the witnesses?

3 Anything from you, Mr Mastro?

4 MR. MASTRO: Your Honor, nothing other than will
5 your Honor take any argument at the conclusion of the hearing?

6 THE COURT: It really depends on how late we go, but
7 I could hear some argument. I have all of your papers which
8 discuss all those issues in great detail and that may be
9 sufficient, but if there's something that you want to put a
10 finer point on I certainly would like to hear from you --

11 MR. MASTRO: Thank you, your Honor.

12 THE COURT: -- and from the State's attorney.

13 And Mr. Farber, anything from you before we get
14 started?

15 Mr. Farber?

16 Well, we need Mr. Farber.

17 Is Mr. Backenson on the call?

18 MR. BACKENSON: Yes, I am.

19 THE COURT: I just wanted to identify you.

20 I know Commissioner Esposito for many years in
21 dealing with the City of New York.

22 And Bishop Chappetto, is this the Bishop?

23 BISHOP CHAPPETTO: Yes, your Honor.

24 THE COURT: So, we have all of our witnesses. I'm
25 just waiting for Mr. Farber.

1 (Pause in proceedings.)

2 THE COURT: Would everyone put their microphones on
3 mute until they're called upon?

4 That will make it a lot easier. If you want to
5 object --

6 MR. FARBER: Can anyone hear me?

7 THE COURT: Mr. Farber?

8 MR. FARBER: Yes, yes, your Honor.

9 THE COURT: You're back? Okay.

10 Are we ready? Did you hear what I said about the
11 order of proceedings?

12 MR. FARBER: I did, your Honor. You asked
13 Mr. Mastro if he had anything prior to proceeding and you then
14 asked me.

15 I do not, your Honor.

16 THE COURT: Thank you.

17 MR. FARBER: We are ready to proceed. I apologize
18 for my technical issues. I don't understand them, but okay.
19 Thank you.

20 THE COURT: Is there a phone number, just in case?
21 Did you provide a phone number to Mr. Reccoppa, my
22 courtroom deputy, just in case?

23 MR. FARBER: Yes, he has my cell phone number.

24 THE COURT: All right. Let's proceed, then.

25 Mr. Mastro, you may call your first witness.

1 MR. MASTRO: Your Honor, Bishop Chappetto.

2 And my colleague Will Moccia is going to do the
3 direct examination.

4 THE COURT: Thank you.

5 MR. MOCCIA: Your Honor, this is Will Moccia, Gibson
6 Dunn, on behalf of Plaintiff.

7 We call Bishop Raymond Chappetto.

8 THE COURT: Please swear in the witness.

9 THE COURTROOM DEPUTY: Sir, just raise your right
10 hand, please.

11 Do you solemnly swear the testimony you shall give
12 to the Court will be the truth, the whole truth, and nothing
13 but the truth, so help you God?

14 BISHOP CHAPPETTO: I do swear that.

15 THE COURTROOM DEPUTY: Thank you.

16 THE COURT: Thank you.

17 Go ahead, sir.

18 MR. MOCCIA: Thank you, your Honor.

19 **RAYMOND F. CHAPPETTO,**

20 called by the Plaintiff, having been

21 first duly sworn, was examined and testified

22 as follows:

23 DIRECT EXAMINATION

24 BY MR. MOCCIA:

25 Q Good afternoon, Mr. Chappetto.

1 A Good afternoon, Will.

2 Q Could you briefly describe for the Court your current
3 occupation?

4 A Yes. I am a Roman Catholic bishop of the Diocese of
5 Brooklyn, and I serve as the Vicar General and the Vicar for
6 Clergy.

7 Q And that's a clerical position within the Roman Catholic
8 Church; is that correct?

9 A That's correct.

10 Q How long have you held that position?

11 A I have been the Vicar for Clergy since 2009 and I've been
12 the Vicar General of the Diocese since 2013.

13 Q And just in brief, what are your responsibilities as
14 Vicar General?

15 A Vicar General is sort of the vice president, you might
16 say, of the Diocese of Brooklyn. I work very closely with
17 Bishop DiMarzio and the governance of the Diocese.

18 Q And since assuming that role, have you continued to also
19 offer public Mass within the Diocese?

20 A Yes, I have.

21 Q And is that at one church?

22 A My role consists of going around to various churches for
23 many different reasons; various celebrations, I help out in
24 different churches. I also get specific assignments to
25 different churches for special occasions, so I do visit many

1 churches.

2 Q When were you initially ordained as a priest in the Roman
3 Catholic Church?

4 A I was ordained on May 29, 1971.

5 Q And can you briefly walk us through some of the positions
6 you've held in the Diocese since your ordination?

7 A I've been a parochial vicar -- that means an assistant
8 pastor -- at four different parishes. I served as a
9 territorial vicar, taking care of 62 parishes in the Brooklyn
10 west region. I was pastor of three different parishes; one in
11 Brooklyn, two in Queens.

12 Then I became an auxiliary bishop, and, after that,
13 I assumed the responsibilities in the administration of the
14 Diocese as well as my pastoral functions.

15 Q And, so, is it fair to say that you held what would be
16 referred to in the Catholic Church as "pastoral roles"?

17 A Yes, I have both roles; I have an administrative role and
18 a pastoral role as well.

19 Q Just so that we're clear for the record, can you please
20 just in general terms explain what it means in the Catholic
21 Church when someone refers to a "pastoral role"?

22 A "Pastoral role" means that you celebrate the sacraments
23 of the Church and you preside over various celebrations;
24 baptisms, funerals, weddings, of course the Eucharist every
25 Sunday and weekday Mass as well.

1 Q I'd like to turn now, just so that we're all talking
2 about the same thing, to a few documents that have been filed
3 in this case.

4 Do you have in front of you a document titled,
5 "Declaration of Bishop Raymond F. Chappetto in support of
6 Plaintiff's application for temporary restraining order and
7 preliminary injunction"?

8 A Yes, I do.

9 Q Do you recognize that document?

10 A Yes, I do.

11 Q And, again, just so that we're clear for the record, does
12 the document at the top have a header that identifies it as
13 Document No. 5?

14 A Yes, it does.

15 Q And are you familiar with the contents of that document?

16 A Yes, I am very familiar with it.

17 Q And are you familiar with the materials that are attached
18 to it as Exhibit A?

19 A Yes. They are memos, and I'm familiar with them.

20 Q And have you re-read that document since you first
21 executed it?

22 A Yes, I have.

23 Q And you signed that document under penalty of perjury; is
24 that correct?

25 A That's correct.

1 Q To the best of your knowledge as you sit here today, are
2 the contents of that document true and correct?

3 A There are some corrections that I think one of which we
4 have corrected in a supplemental document.

5 Correction number one would be the names and number
6 of parishes that have been affected by the executive order.
7 We have corrected it in a supplemental document because we
8 received interactive maps that helped us to get a clearer
9 picture and better identify the parishes that were affected.
10 So, yes, that's the first correction, would be in the
11 supplemental document. We do say that there are 26 parishes
12 that have been affected by the executive order.

13 The second correction is that in the listing of the
14 people who have assisted Joseph Esposito in the reopening
15 committee that was formed, the last -- it's paragraph eight on
16 page three, the last sentence is incorrect. It must be a
17 typographical error.

18 The last sentence reads, "The commission regularly
19 consulted with a mental health expert." It should say a
20 medical health expert. The word "medical" should be
21 substituted for "mental." That's the second correction.

22 Q Thank you very much for those.

23 Aside from those two corrections that you've
24 identified, are the remaining contents of the declaration true
25 and correct as you sit here today?

1 A Aside from those two items, the documents are correct and
2 true.

3 Q Thank you very much.

4 The second document I want to just briefly discuss
5 is titled, "Supplemental declaration of Bishop Raymond F.
6 Chappetto in further support of Plaintiff's application for
7 preliminary injunction."

8 Do you have that document in front of you?

9 A Yes, I do.

10 Q And are you familiar with that document?

11 A Yes, I'm very familiar with it, yes.

12 Q And, again, just so the record is clear, does the header
13 at the top of that document identify it as Document 21?

14 A That's correct.

15 Q And have you re-read that document since you first
16 executed it?

17 A Yes, I have.

18 Q And you signed that document under penalty of perjury; is
19 that correct?

20 A Yes, I did.

21 Q And to the best of your knowledge as you sit here today,
22 are the contents of that document true and correct?

23 A Yes, they are correct and true.

24 Q Thank you very much. So, I want to just now talk briefly
25 about COVID-19.

1 In your role as Vicar General, have you been
2 involved in the Diocese of Brooklyn's response to COVID-19?

3 A Very much so. I have been working very closely with
4 Bishop DiMarzio on all aspects of it.

5 Q And could you please identify who Bishop DiMarzio is?

6 A Yes. Bishop Nicholas DiMarzio is the Bishop of the Roman
7 Catholic Diocese of Brooklyn. I am Auxiliary Bishop.

8 Q Thank you. For simplicity here on out in this
9 questioning, if I refer simply to the "Diocese," I'll be
10 referring to the Diocese of Brooklyn; is that okay?

11 A Yes, certainly.

12 Q How did the Diocese initially respond to the COVID-19
13 outbreak in New York?

14 A Well, we took the initiative of closing our churches to
15 the public for the safety and protection of the people. When
16 the pandemic first broke out and we saw that it was
17 escalating, we wanted to be proactive at that point. We took
18 the initiative of closing the churches to the public.

19 Q And was that before or after the City and State
20 prohibited large public gatherings?

21 A We did it before the public demand to do so.

22 Q And what, if anything, did the Diocese do in between the
23 time it closed for public Mass and the time it reopened?

24 A During that time, we encouraged our pastors and our
25 parishes to do virtual Masses, livestreaming Masses, so that

1 the faithful people could continue to worship, you might say,
2 at a distance.

3 We did keep in touch with people through phone
4 calls, through robocalls, through various communications, our
5 Diocesan newspaper, keeping the people informed of what was
6 happening, why it was happening, and always looking forward to
7 a change.

8 Q And were there any specific steps taken with respect to
9 the pandemic itself to prepare for an eventual reopening?

10 A Very much so.

11 When we came towards the end of the time, we
12 realized that we would be reopening but we wanted to be
13 prepared. So, we formed a committee headed by Joseph
14 Esposito, and this committee's charge was to give advice and
15 recommendations to the Bishop on how to safely reopen the
16 churches.

17 Q Is it correct that the commission developed protocols
18 that would later be implemented by the Diocese?

19 A That's correct. After many meetings -- we met many
20 times -- we decided to present our recommendations to the
21 Bishop for his approval.

22 Q And you mentioned some meetings of the commission. Well,
23 I guess let me take a step back.

24 Approximately how many people were on this
25 commission?

1 A Approximately ten to twelve people.

2 Q In general, can you describe their backgrounds?

3 A They came from all different walks in life; some were
4 police officers, some were legal representatives, some were
5 Diocesan representatives who knew things about buildings.

6 So, we had various disciplines represented on the
7 commission.

8 Q And you touched on this earlier when we were discussing
9 corrections to the declarations, but am I correct that there
10 were also consultations with medical professionals?

11 A Yes, we had a consultation with a medical professional,
12 that's correct.

13 Q And was it one consultation or were there ongoing
14 consultations?

15 A I believe there were several consultations.

16 Q And in general, how often was the commission meeting
17 during this time period?

18 A We were meeting weekly. For between four to six weeks,
19 we met weekly. And then as the time came closer, we did not
20 meet as often. But at the beginning, I would say it was every
21 week for four to six weeks.

22 And then once the document was ready, the commission
23 had served its purpose, so we disbanded and we did not meet
24 again.

25 Q And this document that you're referring to, are those the

1 protocols that we discussed a few minutes ago?

2 A That's correct.

3 Q And could you just walk us through some of the protocols
4 that are in that document?

5 A Yes. We instructed all of our pastors to carefully mark
6 out the church -- and that means with masking tape, other
7 kinds of markings -- to make sure that the people when they
8 came back would be socially distanced, so that they would be
9 six feet apart, they'd be seated every other row. And that
10 was the first thing, was the social distancing.

11 Then we instructed the people that they would not be
12 admitted into the church unless they had a mask on.

13 We told our pastors to get hand sanitizers at the
14 doors of the church and to post signs at the church entrances
15 instructing the people that if they did not have a mask on,
16 they would not be admitted in; and to use the hand sanitizers
17 upon entrance.

18 We also instructed them to get cleaning supplies, to
19 buy them in bulk, so that we could make sure that after every
20 service, after every Mass, the churches would be cleaned and
21 sanitized. Many of them bought the machines to do it
22 mechanically to make sure that the churches were being cleaned
23 and sanitized in a proper way.

24 These are just some of the ways in which we
25 instructed our pastors to prepare, to get ready, so when the

1 day would come when we could reopen, then we would be entirely
2 ready and prepared to make sure the people were kept safe.

3 Q And how about the Mass itself? Were any changes made to
4 the parts of the Mass?

5 A Well, we encouraged the celebrants of the Mass to make it
6 as short as possible so that the people would not be detained
7 unnecessarily.

8 We changed the way in which Holy Communion was
9 distributed. People were told that they would receive in
10 their hand and not on the tongue, which is an option that we
11 generally do have. But for this time period, people were told
12 that they would receive in the hand; that they would come up
13 to the altar, keeping the social distancing, they would keep
14 their masks on when they received Holy Communion, they would
15 step to the side, they would then remove their mask, they
16 would receive the Holy Communion, and then they would put
17 their mask back on again as they returned to their seats.

18 Q And in terms of capacity at Mass, am I correct that you
19 reopened at a limited capacity?

20 A Yes, we opened up at 25 percent capacity. The first
21 reopening, however, was with ten people in which -- the first
22 reopening was just for visits to the church, without services.

23 And then we went to the second phase, which was
24 services with ten people. I, myself, celebrated a funeral for
25 a priest with ten people present. Only ten people.

1 And then we went to the third phase, which was the
2 reopening at 25 percent capacity.

3 Q And you've remained at 25 percent even after the State
4 has permitted larger gatherings; is that correct?

5 A Yes, we have.

6 Q Bishop Chappetto, to your knowledge, were the protocols
7 recommended by the commission adopted by the Diocese?

8 A Yes, they were.

9 Q And to your knowledge, were those protocols implemented
10 by churches within the Diocese?

11 A Yes, they were.

12 I have visited many of the churches myself because,
13 as I mentioned before, I am a Sunday Mass celebrant in the
14 different churches, and I see how the pastors have implemented
15 the protocols in a very serious way.

16 Q And does the Diocese have a way for parishioners to
17 report any incidence of COVID-19?

18 A They can call the pastors and let them know if there were
19 any incidences.

20 Q And are you aware of any outbreaks of COVID-19 in any
21 churches within the Diocese since the reopening you described?

22 A I am not aware of anything that has come to my attention.

23 Q And if there were such incidences, would you expect them
24 to come to your attention?

25 A I think I would be among the first to know.

1 Q And why is that?

2 A Because of the position that I hold. And the pastors,
3 they all have my cell number, they know they can call me at
4 any time about any reason pertaining to the church or
5 pertaining to the situation. So, they would inform me if
6 there was a COVID breakout from the church.

7 Q And based on your firsthand observations while visiting
8 and saying Masses at the parishes within the Diocese, how
9 would you describe the level of compliance with the protocols?

10 A I am very much impressed. I have to be -- what I see is
11 complete compliance as I go around.

12 I complimented one parish that I was at recently.
13 They formed teams of people because they have four or five
14 services on a Sunday, four or five Masses on a Sunday, and
15 there's a team after each Mass that does the cleaning. And,
16 in fact, in this particular parish, one time the team for some
17 reason was not able to make it, and one of the priests himself
18 did the cleaning to be sure that it was done.

19 So, I can tell you my own eyes have seen what
20 they're doing as far as sanitizing, cleaning, people wearing
21 masks. I compliment the people. I tell them it's not easy,
22 it's an annoyance to wear it, they must wear it. And they're
23 all doing it.

24 So, I would have to say the compliance is excellent.

25 Q For those on the call who might not be familiar with the

1 Catholic faith, could you just in brief explain what it means
2 to go to Mass?

3 A Well, for us, the attendance at Mass is obligatory on
4 Sunday; they can go to the vigil Mass on Saturday night or
5 Mass on Sunday. It's obligatory.

6 And the Mass consists of readings from the Sacred
7 Scriptures; a Homily, which is an explanation of those
8 readings and how they apply to our daily life; and then the
9 celebration of the Eucharist, which is the presentation of the
10 bread and wine, the consecration of the bread and wine into
11 what we believe is the Body and Blood of our Lord and Savior,
12 and then the distribution of the Holy Communion to the
13 individual people. That is the heart and center of the
14 Eucharist, is the consecration and the distribution of the
15 Eucharist. And then there's a dismissal, final prayer and a
16 dismissal.

17 Q How important is it that the Mass be celebrated in
18 person?

19 A It's absolutely essential because people who have watched
20 on TV have said, "It's a nice thing to watch it on the TV, but
21 it's not the same. You cannot receive Communion at home."

22 The priest has no way of bringing Communion to every
23 household. It's impossible. So, for them to be in attendance
24 at church, it's the fullness of the Eucharist, it's the
25 complete Eucharist by receiving Holy Communion, and it's

1 really absolutely essential.

2 People were starved for Holy Communion during the
3 pandemic because while they could watch it on TV, which was
4 very nice, they couldn't receive the Eucharist. And that was
5 the heartbreak of our people because that's what defines us as
6 Catholics. We are what we call a "Eucharistic people." We
7 are people of the Mass, and the Mass defines us and it really
8 tells us who we are.

9 Q And you touched on this briefly, but if you could just
10 elaborate, please, on how the lack of in-person Mass impacted
11 parishioners during the pandemic.

12 A It was definitely a hunger to receive the Eucharist. It
13 was a hunger on the part of the people. I spoke to many of
14 them personally who told me the spiritual void that they felt
15 in not being able to receive Holy Communion. It was a great
16 loss for them.

17 So, coming back to the -- when the Mass was again
18 allowed to be celebrated with people present, it was a great
19 joy and a great relief. The hunger that they had is now being
20 satisfied.

21 Q I'd like to hone in a little more. You referenced Holy
22 Communion. I realize there are whole theological treatises
23 written on this, but, if you could, just succinctly spell out
24 from a theological perspective what the significance of Holy
25 Communion itself is.

1 A We believe that Jesus at the Last Supper with the twelve
2 Apostles changed the bread and the wine into the Body and
3 Blood of Christ. That was the first Mass, at the Last Supper.

4 We believe that every Mass is a recreation of the
5 Last Supper, every Mass is a celebration of the Lord's Supper.
6 And we believe that Jesus said to do this in His memory. To
7 continue that, we celebrate Mass daily. Every day at every
8 church there is a Mass.

9 But on Sunday, the people have the obligation to
10 attend the Mass because we believe that they are listening to
11 the Word of God and that they are participating in the Lord's
12 Supper. The consecration of the bread and wine is the most
13 serious part of the Mass and receiving the Holy Communion for
14 a Catholic is the essence of what it means to be a Catholic.

15 Q And prior to the pandemic, how would one normally receive
16 Holy Communion during Mass?

17 A Prior to the pandemic, people would have a choice, and
18 the choice is up to them: To receive Communion in their hand
19 and then to place the Holy Eucharist into their mouths by
20 themselves; or the other option that was there prior to the
21 pandemic was the opportunity receive Communion on their
22 tongue. They would extend their tongue and the priest would
23 place the Holy Eucharist on their tongue and then they would
24 consume it that way.

25 Q And you said that that choice has been removed; is that

1 correct?

2 A We removed that choice for sanitary reasons so that we
3 could keep our people safe, yes.

4 Q And again now speaking prior to the pandemic, was there
5 also an option of receiving the Precious Blood during Holy
6 Communion?

7 A Yes, there was. Thank you for mentioning that.

8 That was completely discontinued -- completely -- so
9 that there would be no chance of anything.

10 It is not necessary for a Catholic to receive both
11 the Holy Communion in the form of bread and the Precious
12 Blood, as we call it, in the form of wine. It is not
13 necessary to receive the Precious Blood. It's receiving the
14 host or the wafer -- it is the Body of Christ -- that is
15 sufficient for a Catholic.

16 So, we discontinued that so there would be no
17 misunderstanding on the part of anybody that they could
18 contract any kind of germs.

19 Q You mentioned about at the end, there's a sending forth
20 and people leave the church.

21 Could you talk briefly about any protocols that were
22 put in place to make sure that people were safely entering and
23 existing the churches?

24 A Yes. We opened the doors of the church, all the doors,
25 so that they could go out the various exits. We encourage

1 them not to the congregate outside as they would do
2 pre-pandemic so that the people could leave and go home as
3 soon as possible.

4 Q And are you familiar with what the State of New York and
5 Governor Cuomo have referred to as the "cluster initiative"?

6 A I'm not familiar with that.

7 Q I can be more specific.

8 Are you aware that as part of a recent regulation,
9 the Governor has issued an executive order that would limit
10 in-person church attendance in certain geographic areas to 10
11 or 25 people?

12 A You're referring to the orange zones and the red zones;
13 you're referring to that?

14 Q Yes.

15 A I am familiar with that, of course. Yes, the orange
16 zones with a limited capacity and the red zones with an even
17 more limited capacity. Yes, I'm very familiar with that.

18 Q And how does that restriction impact the Diocese?

19 A Oh, a tremendous, tremendous impact. This is the hardest
20 thing that we are dealing with is the fact that our people
21 were coming back to Mass after that long period of absence,
22 they had just started to get used to the idea of coming back
23 and that it was safe because we made it safe, we made the
24 environment safe, and then to have this come upon us was very
25 difficult because it seems like we're going backwards instead

1 of going forwards.

2 Q And Bishop Chappetto, is there anything else that you'd
3 like to tell the Court about the why the Diocese's churches
4 should be permitted to reopen this Sunday for Mass subject, of
5 course, to a 25 percent capacity cap and any other safety
6 measures that the Diocese has implemented and agreed to
7 implement?

8 A I think that the essential nature of the worship of our
9 people, people need to worship, people need to be present for
10 the reception of the Eucharist, people need to be present
11 because they belong to a community of faith. And to deny them
12 that is not very, very easy to swallow.

13 We need to have our people in church. We need to
14 have our people receiving the Eucharist. People want to be
15 there and we have done everything that we could possibly do,
16 to my knowledge, to make the environment safe for them so that
17 when they do come into the church they are safe. And we will
18 continue to do that as much as possible.

19 Q Thank you very much, Bishop Chappetto.

20 MR. MOCCIA: Your Honor, I have nothing further for
21 the witness at this point.

22 THE COURT: All right. Thank you.

23 Mr. Farber, do you have any questions for the
24 witness?

25 MR. FARBER: Thank you, your Honor. I have a very

1 brief cross, if I might.

2 THE COURT: All right. Please introduce yourself to
3 Bishop Chappetto.

4 MR. FARBER: Yes. Good afternoon, Bishop. My name
5 is Seth Farber. I'm with the Attorney General's Office, and I
6 represent Governor Cuomo today.

7 BISHOP CHAPPETTO: Thank you.

8 MR. FARBER: Thank you, sir.

9 CROSS-EXAMINATION

10 BY MR. FARBER:

11 Q In your declaration, you state that -- I'm referring to
12 Paragraph 15 of the -- which is on Page 6 of Document 5, the
13 first declaration you gave in this case, you state that you
14 have a reporting structure and you would know whether there
15 have been any instances of COVID-19 spread in your churches;
16 correct?

17 A That's correct.

18 Q And it's fair to say that you know this based on what
19 parishioners report to either their parish priest or other
20 church officials, correct?

21 A That's correct.

22 Q So if, for example, a parishioner were asymptomatic and
23 didn't even know they were COVID positive, of course they
24 couldn't report that to their parish priest or church
25 officials, correct?

1 A If they don't know they have it, then they couldn't
2 report it, you're right.

3 Q Okay. And my understanding is in your protocol, there's
4 no particular requirement that parishioners show a negative
5 COVID test before attending church service; is there?

6 A No, we do not have that provision in the protocols.

7 Q Okay. And similarly, if a parishioner actually had
8 symptoms of COVID but for whatever reason failed to report
9 that to a parish priest or a church official, you wouldn't
10 know that either, correct?

11 A If they failed to report it, we would not know it.

12 Q Thank you very much, Bishop.

13 MR. FARBER: Nothing further from me.

14 THE COURT: All right. Thank you.

15 Anything else from Plaintiff's counsel?

16 MR. MOCCIA: Your Honor, just a very quick redirect,
17 if I might.

18 THE COURT: Please.

19 REDIRECT EXAMINATION

20 BY MR. MOCCIA:

21 Q Bishop Chappetto, Mr. Farber asked you about people who
22 might come to church and not be aware or might not have
23 disclosed that they are COVID positive.

24 I just want the record to be clear if any such
25 person attended Mass, am I correct that they would be

1 physically distanced from anyone else attending the Mass?

2 A Well, we've told people very clearly if you are sick, if
3 you have any symptoms, stay home. That's part of the
4 protocol. So, we've discouraged them from coming. If they
5 felt sick or had any symptoms, we've made it very clear that
6 they were not to come to the Mass.

7 Q Understood. So, my question then is even assuming
8 Mr. Farber's hypothetical scenario where one actor disregards
9 that instruction, that person would still be attending Mass
10 subject to all the distancing and the no receipt of the
11 Precious Blood and everything else we discussed a short time
12 ago; is that correct?

13 A Absolutely, yes, that's correct.

14 Q And then I guess the other question is about the
15 reporting structure.

16 So, am I correct that in addition to just any
17 informal word of an individual parishioner telling you that
18 there's an issue, is there also a formal reporting structure
19 within the Diocese by which the pastors would be directed to
20 contact someone, either yourself or someone else higher up
21 within the Diocese, about the situation?

22 A Yes. At beginning of the pandemic, there were numerous
23 calls made to me because of the outbreak. And you know, we
24 waited for that 15-day period to be sure and we received
25 several calls at the beginning. But we're talking now at the

1 middle of March.

2 So, at that time, yes, we did get calls, but then
3 since then we've done so much and so much time has passed.
4 Mass, you know, closing the churches, we helped to flatten the
5 curve. We helped to bring the numbers down. We were working
6 to do that, conscientiously to do that, to make those numbers
7 come down. We succeeded in helping and doing our part.

8 Q And then you've now largely touched on that with this
9 answer, but I just want to clarify. Mr. Farber read a portion
10 of Paragraph 15 of your declaration. That paragraph also
11 says, "To my knowledge, since our churches reopened in July
12 for Mass and other religious ceremonies subject to our safety
13 protocols, there has not been any COVID-19 outbreak or spread
14 in any of our churches --"

15 MR. FARBER: I'm going to object, your Honor.

16 THE COURT: Overruled.

17 You can go ahead.

18 Q Bishop Chappetto, is that statement correct?

19 A Yes, that's correct.

20 Q And just to reiterate, anyone attending Mass would be not
21 just physically distanced from the other parishioners but also
22 would be wearing a mask; is that correct?

23 A Yes, they must wear the mask, that's correct.

24 MR. MOCCIA: Thank you very much.

25 Nothing further, your Honor.

1 THE COURT: Anything else, Mr. Farber?

2 MR. FARBER: No, your Honor, no recross.

3 THE COURT: Thank you very much.

4 Thank you very much, Bishop. You're excused.

5 And I'll ask the Plaintiff to call their next

6 witness.

7 You have to turn on your microphone, please, Mr.

8 Mastro.

9 Not yet.

10 MR. SHAPIRO: I can take over.

11 THE COURT: I wanted to see if Mr. Mastro can do

12 this.

13 (Pause in proceedings.)

14 THE COURT: All right. We'll give him some time.

15 I'm sure he'll have something to say later.

16 Just identify yourself. Everyone when they speak

17 should identify themselves for the court reporter.

18 So, go ahead.

19 MR. SHAPIRO: Akiva Shapiro, A-K-I-V-A, from Gibson

20 Dunn, counsel for the Plaintiff.

21 I will be calling Joseph J. Esposito.

22 THE COURT: All right, Mr. Esposito?

23 MR. ESPOSITO: Good afternoon, your Honor.

24 THE COURT: Please swear in the witness.

25 THE COURTROOM DEPUTY: Sir, please raise your right

1 hand.

2 Do you solemnly swear the testimony you shall give
3 to the Court will be the truth, the whole truth, and nothing
4 but the truth, so help you God?

5 MR. ESPOSITO: I do.

6 THE COURTROOM DEPUTY: Thank you.

7 THE COURT: You may proceed.

8 MR. SHAPIRO: Thank you, your Honor.

9 **JOSEPH J. ESPOSITO,**

10 called by the Plaintiff, having been

11 first duly sworn, was examined and testified

12 as follows:

13 DIRECT EXAMINATION

14 BY MR. SHAPIRO:

15 Q And good afternoon, Commissioner Esposito. Thank you for
16 taking the time to be with us.

17 If we just start out, if you could give the Court a
18 little bit of a background, a brief overview of your
19 professional background?

20 A Sure. I started in New York City Police Department in
21 1968 as a police trainee. I rose through the ranks during the
22 next 45 years, ultimately became the chief of the department.
23 The chief of the department is the highest-ranking uniformed
24 member of the NYPD. I held that position for almost 13 years.

25 After my mandatory retirement at age 63, I was hired

1 as the Commissioner for New York City Emergency Management,
2 where I served from 2014 to 2019.

3 THE COURT: Before you go any further, the Court is
4 very familiar with Commissioner Esposito from his service as
5 the head of the Office of Emergency Management and also his
6 tenure in the police department and has the greatest respect
7 for his accomplishments serving the New York City community.

8 So, let's go on.

9 THE WITNESS: Thank you, your Honor.

10 MR. MASTRO: Can you hear me now?

11 THE COURT: Yes, I can. Thank you, Mr. Mastro.

12 MR. MASTRO: I'm back. Thank you.

13 THE COURT: Let's proceed.

14 MR. SHAPIRO: Certainly, your Honor. I'm going to
15 ask only one more question about background just because it
16 ties in directly to the substance of what we're talking about.

17 Q As Commissioner of New York City Emergency Management,
18 were you involved in preparing for infectious disease
19 outbreaks or pandemics?

20 A Sure. I mean, in my role in the NYPD also, we managed
21 emergencies and prepared for emergencies. But as my role as
22 Commissioner of Emergency Management, that was one of our
23 primary responsibilities: To train people, to look at plans,
24 to help City agencies make plans, and actually have tabletop
25 exercises where we would deal with certain disasters. And on

1 a number of occasions, we would deal with pandemic in New
2 York.

3 Q Thank you. I'll move on past background now.

4 Do you have in front of you a document titled,
5 "Declaration of Joseph J. Esposito in support of Plaintiff's
6 application for a temporary restraining order and preliminary
7 injunction"?

8 A Yes, I have it in front of me.

9 Q Okay. And that document is titled or marked Document 6
10 at the top, the front page?

11 A Yes, it is.

12 Q Great. I'm going to call that document your declaration.

13 Did you review your declaration before signing it on
14 the last page?

15 A Yes.

16 Q And at that time of signing it, you certified, affirmed,
17 that it was true under penalty of perjury; is that right?

18 A Yes.

19 Q Great. And to the best of your knowledge, are the
20 content of your declaration true and correct?

21 A Yes, they are.

22 Q Okay. And have you re-read your declaration since you
23 signed it?

24 A Yes.

25 Q And is there anything that you'd like to modify or

1 correct?

2 A No.

3 Q Okay. Now I'm going turn your attention to the Diocese's
4 response to the COVID-19 pandemic. And just so we're all on
5 the same page, as far as my colleague Mr. Moccia, when I refer
6 to "the Diocese," I'm referring to the Roman Catholic Church
7 of Brooklyn, New York, which is the Plaintiff in this action.

8 How did you come to be involved -- did you come at
9 some point in time to be involved in the Diocese's response to
10 the COVID-19 pandemic?

11 A Yes, I was.

12 Q How did you come to be involved in it and what was your
13 role?

14 A Well, I'm a practicing Catholic in Brooklyn. I'm well
15 known to the Diocese; members of the Diocese, bishops,
16 monsignors, a lot of the local priests. I've actively served
17 on a committee since 2013. I'm the chair of a committee,
18 voluntary work, where I investigate misconduct by clergy. So,
19 in that role, I became very familiar with the Bishop and the
20 staff of the Diocese.

21 So, and, again, when Corona hit, I was asked to come
22 onboard and help with the opening of the churches in a safe
23 manner.

24 Q And, so, what did the church do or the Diocese do to --
25 in response to the coronavirus?

1 A Well, we formed a committee, as the Bishop had stated.
2 We met on a regular basis. We looked at the federal, state,
3 and city guidelines, we made sure that we used them as our
4 guidelines to open up the churches. Multiple, multiple
5 meetings, communications back and forth with the pastors of
6 the churches, getting their feedback on our plans that they
7 developed. Ultimately, the plans were okayed.

8 Again, we spoke to medical professionals. We had
9 people on the committee who were planners, who had planned
10 major events in the NYPD.

11 As a result, we come up with these guidelines. I
12 believe it's your Exhibit A. Those were the final plans that
13 went out to the parishes. And we went out and put those plans
14 in effect.

15 MR. SHAPIRO: And just for the record, that's
16 Exhibit A to Commissioner Esposito's declaration.

17 Q Okay. And when you made the various protocol
18 recommendations, safety recommendations, were those all made
19 or done in consultation with medical professionals?

20 A Yes, yes, I spoke to a number of medical people to get
21 their input, especially on the Communion issue, receiving
22 Communion.

23 The other restrictions, again, we complied with the
24 federal, state, and city restrictions, but we also talked with
25 medical experts for their input if they thought we had

1 anything we could modify the plans or add to them. But they
2 were really concerned with the part of receiving Communion.

3 Q And the Bishop has covered the changes that were made to
4 the Holy Communion, so I won't walk through that again, it's
5 in the record.

6 But if you could, just summarize the other changes
7 that were made or the other protocols that were put in place
8 for the churches in the Diocese to ensure the safety.

9 A Sure. I'd just like to re-stress what the Bishop said
10 about receiving Communion.

11 Receiving Communion is a very, very important part
12 of the Mass service. There are people that feel they haven't
13 really gone to Mass and done their responsibility if they
14 haven't received. So, that was a real big sore point for a
15 lot of the parishioners, especially the older parishioners.
16 It's a very, very important piece to keep in mind.

17 Things that we did: The churches should be
18 sanitized following protocols based on federal, state, and
19 city; social distancing measures; pews, we knocked off a --
20 every other pew was closed to ensure that social distancing of
21 the six feet. All the pews were marked six feet apart, so
22 that we had stickers or tape or some kind of marker that
23 people would stay six feet apart. Unless you were a family
24 member and you lived together with the family, then you could
25 sit together.

1 Occupancy was limited. Again, everyone had to wear
2 a face mask. We encouraged gloves also, if you had them, to
3 wear gloves.

4 Well-ventilated. We made sure that the churches
5 kept the windows open a lot of time so that the air could come
6 through.

7 Hand sanitizer was provided.

8 We encouraged the at-risk population, people with
9 prior medical conditions, we asked them it might be best to
10 stay away.

11 We reinforced all the hygiene protocols, hand
12 washing. We closed the bathrooms. Many of the churches have
13 restrooms; we closed the restrooms.

14 Things of that nature.

15 Q And how about the entrances and exits and the way that
16 people came in and out of the church?

17 A You know, I'll just mention Saint Athanasius. I'm very
18 familiar with Saint Athanasius. That's my own personal
19 parish.

20 They have at least five entrances. On a normal
21 Sunday, the parishioners enter and leave from that main
22 entrance because they would have the priest who conducted that
23 Mass be generally at the door of the church or on the
24 sidewalk. And he greets the people; he'll shake their hand,
25 he'll bless an object if they brought for the kids, they sign

1 papers to show that the kids were at church.

2 So, we eliminated that. There's no more proceeding
3 into the church, and the priest comes on the altar from the
4 sanctuary door. And, again, he doesn't greet the people at
5 all.

6 And again, Saint Athanasius has five doors. On a
7 normal Sunday, the main door is used, the side door, we're
8 making people go out another two doors to really get the back
9 of the church. We encourage, a lot, not congregating in front
10 of the church the way they normally would do.

11

12 (Continued on the following page.)

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1 BY MR. SHAPIRO: (Continuing)

2 Q And to your knowledge, is that representative of the
3 changes that other churches within the Diocese have made in
4 the way that they enter and exit?

5 A Oh, yes, sure. I visited a number of churches as a
6 result of this, St. Athanasius in Williamsburg, Mount Carmel
7 in Greenpoint, and more churches in Queens, and all of the
8 protocols we've put in place, I've seen them being used in all
9 of the churches that I've been to.

10 Q And you had mentioned limiting the occupancy. Was there
11 any specific cap or percentage that you were limiting
12 occupancy to?

13 A Yes, the 25 percent.

14 Q Okay. Great. And that was for all the churches in the
15 Diocese, is that right?

16 A Yes. And then some of the churches had to modify their
17 schedule. Some added masses. Some removed masses. We
18 adapted. Just even the scheduling of the masses was, was
19 restructured to help with the, with the problem.

20 Q And were there any changes made or steps taken with
21 respect to additional employees or individuals in the
22 churches, inside the churches to ensure compliance?

23 A Sure. We go back to the original opening. We opened up
24 originally just for prayer on a Monday to Friday basis where
25 people go into the church, say a prayer and leave. And then

1 after that, we went to a Monday to Friday mass where we have a
2 mass Monday to Friday, a daily mass. Then, ultimately, we
3 went to the masses on the weekend, Sundays, and we limited
4 those folks and we had ushers, some churches hired security
5 guards. I know at St. Dominic's, they had a security guard
6 and he would make sure that everyone wore a mask, social
7 distancing. The numbers were kept to the acceptable level.

8 So, yes, every church did something. Either they
9 organized, as the Bishop had mentioned, different groups to
10 sanitize the churches, but they all added ushers or people.

11 Q And to your knowledge, were the protocols that your group
12 put together, the commission put together communicated to
13 individual churches in the Diocese?

14 A All of them.

15 Q And I don't know if I asked before. What was your role
16 in the commission that the Diocese put together?

17 A The chairperson.

18 Q And to your knowledge, have the protocols that your
19 commission put together been adopted by all the churches in
20 the Diocese?

21 A They were mandated to accept it. If you know anything
22 about the Catholic church, when the Bishop says something, the
23 parishes listen.

24 Q And, in fact, in your, from what you saw with your own
25 eyes, they did, in fact, listen, right?

1 A Without a doubt.

2 Q And I guess, you know, I mean, I imagine the parishioners
3 and the priests throughout the Diocese have the utmost respect
4 for the Bishop and would certainly follow any directive that
5 he put out, any mandate that he put out?

6 A Yes. As a matter of fact, I was, I went to
7 St. Athanasius. I guess it was ten days ago or so, Bishop?
8 We had the confirmation. We had a double session
9 confirmation.

10 We had to split the ceremony to accommodate the
11 crowd. We probably had 120, maybe 150 kids receiving
12 confirmation, and we had to use strict regulations because
13 it's a very, very important sacrament to receive and usually
14 you bring your whole family. We limited it. You only had the
15 sponsor and mother and father and it was very, very -- it
16 wasn't easy to do. We had people at the church trying to get
17 in with more and more people. We had to stop them. So, yes,
18 they complied but when they don't, we have ushers there to
19 make sure they comply.

20 THE COURT: I'm sorry. Where did this event take
21 place?

22 THE WITNESS: The confirmation?

23 THE COURT: Yes.

24 THE WITNESS: This was at St. Athanasius. And I
25 guess it was about 10 days ago, Bishop? I think it was last

1 Tuesday, I believe.

2 THE COURT: All right. Thank you. Go ahead.

3 Q And did the Diocese, to your knowledge, have any protocol
4 or instructions in place for priests to report on any COVID-19
5 instances that they become aware of coming out of church
6 services?

7 A Yes. They've been instructed -- the priests will
8 instruct the parishioners to stay home if they're sick and if
9 they do feel sick and they were at church there, we've asked
10 them to report it to their local parish.

11 Q And would you be told, would you be informed if there had
12 been any reported outbreaks or cases that were reported of
13 that structure?

14 A I would have been notified, yes.

15 Q And are you aware of any outbreaks of COVID-19 or spread
16 in any of the Diocese churches or parishes since the
17 reopening?

18 A Not to my knowledge.

19 Q Just a couple final questions and I'll wrap up.

20 You're familiar with the order, the executive order
21 from the Governor that this proceeding is about which, in
22 practice, limits attendance at churches and the Diocese to a
23 fixed cap of 10 or 25 people regardless of the size of the
24 church, right?

25 A Yes.

1 Q Since that order came out about a week and a half ago,
2 what has the effect been on the churches of the Diocese in
3 your experience?

4 A We've been devastated. We've been devastated. I was at
5 church on Sunday just to help communicate that St. Athanasius
6 was closed. There were people at the front door of churches
7 crying because they can't go to church. They showed with
8 their entire family, they want to come in and celebrate the
9 mass. We had to turn them away. It's very, very
10 disheartening especially because, really, talking about
11 Brooklyn and Queens, would have complied, we've gone above and
12 beyond what the regulations have asked us to do and I think
13 it's just unfair the way they've done this, with a blanket
14 statement: Close all the houses of worship.

15 I think what would be a better way of doing this, if
16 you want my opinion, is the Health Department has thousands of
17 people working for them and they have a multitude of
18 inspectors. Well, get a hundred, get 200 inspectors and go
19 out and visit on a Friday, visit a mosque. That's their big
20 prayer day. On a Saturday, visit the synagogues. That's
21 their big prayer day. On a Sunday, go to the Catholic
22 churches, Christian churches, all churches. And if you find
23 that house of worship was in violation, well, then you give a
24 warning, you close them down, take some kind of action against
25 them, but to do a blanket statement where you're closing all

1 houses of worship, those that have been complying, ones that
2 are doing what they can to do the right thing, to close them,
3 you're really defeating the purpose. You're smacking the
4 people that are listening to you. A better way would be smack
5 the people that aren't listening to us.

6 Q Thank you for that.

7 Based on your experience in emergency management,
8 NYPD and information you've obtained chairing the Diocese
9 COVID-19 commission, do you believe that it's safe for the
10 churches and the Diocese to stay open as long as they comply
11 with the 25 percent capacity cap and all of the safety
12 protocols the Diocese has instituted?

13 A Without a doubt. Without a doubt. I've been there.
14 I've been in church every Sunday. I've been at a number of
15 special events, weddings and funerals, Communions,
16 Confirmations. They have been, they have been abiding by the
17 rules to the umpteenth percent and to criticize them or to,
18 you know, make them close as a result of them doing the good
19 thing is just counterproductive.

20 Q And last question. Is there anything else that you'd
21 like to tell the Court about why the Diocese churches should
22 be permitted to reopen Sunday for mass, Sunday, subject to the
23 25 percent cap and the all the other safety measures? Any
24 other additional thoughts you want to give the Court?

25 A Well, I think I've articulated it but, again, I just want

1 to tell you how important it is for the parishioners to go to
2 church on a Sunday. They want to meet their fellow
3 parishioners. They want to relate to them and talk to them.

4 It's been very, very stressful. You know, I talk to
5 so many people and they're stressed out to the max. They need
6 communication with their co-parishioners. You know, you watch
7 it on Facebook. They do a great job, the Diocese is doing
8 great, putting the masses out, but there's nothing to replace
9 going to church, seeing your fellow parishioners, seeing your
10 local, you know, your local religious leader, shaking his
11 hand, getting a blessing from him on a Sunday. There's
12 nothing better than that and we're missing that every Sunday.
13 And, again, doing it virtually, it helps us but it doesn't
14 replace being there.

15 MR. SHAPIRO: No further questions on direct,
16 Your Honor.

17 THE COURT: Thank you very much.

18 Mr. Farber, any question?

19 MR. FARBER: Very brief, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. FARBER:

22 Q Good afternoon, Mr. Esposito.

23 A Good afternoon.

24 Q My name is Seth Farber. I'm with the Attorney General's
25 Office. I'm representing the defendant Governor Cuomo today.

1 In brief, sir, you've acknowledged that social
2 interaction is a big part of the experience of going to
3 church. Is that fair to say?

4 A Yes.

5 Q Okay. Is it fair to say, sir, you have no training in
6 epidemiology or infectious disease?

7 A The only training I have is the tabletops that I would
8 conduct at Emergency Management. No, no official medical
9 training.

10 Q Okay. All right. Thank you, sir.

11 THE COURT: Anything else from plaintiff?

12 MR. SHAPIRO: Yes, very briefly, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. SHAPIRO:

15 Q Commissioner Esposito, Mr. Farber was asking you about
16 social interactions, but all social interactions that occur in
17 churches since they have reopened have been subject to the
18 protocols that you and your commission put in place, right?

19 A Yes. There's one thing that wasn't mentioned. You know,
20 during the mass, we greet one another. You know, we'll say,
21 you know, "Peace be with you," and people will shake hands,
22 they'll hug, they'll do a cheek kiss. That has been
23 eliminated also. When you say, "Peace be with you," the most
24 you are going to get is you turn around, wave at your fellow
25 parishioners and say, "Peace be with you." So that social --

1 and we've modified the way we're doing mass.

2 Q And just to be clear, nobody is shaking the priest's hand
3 nowadays?

4 A No contact.

5 Q And everyone is social distanced 6 feet or more apart
6 both during mass and afterwards?

7 A Yes.

8 Q Okay. And everyone's wearing a mask the entire time that
9 they're in the church except for the brief moment when they've
10 stepped to the side and take from the Holy Communion?

11 A No mask, no mass. That's been our slogan.

12 Q And so the parishioners know that the socializing that
13 they are doing in church is not like any kind of socializing
14 they would have done in the old days before COVID, right?

15 A That's correct.

16 Q And everyone is very careful to maintain all of the
17 requirements that the Bishop has put in place and mandated
18 that everyone comply with?

19 A Very much so. And if they don't do it by themselves, we
20 have enough additional ushers and security to mandate that
21 they do. We, we -- a fellow was giving us a bit of a hard
22 time the other day about putting a mask on. I had to go over
23 and tell him, "No mask, you can't come in." He ultimately put
24 on a mask and came in.

25 Q But to your knowledge, even that kind of brief

1 intransigences happen very infrequently, right?

2 A Yes. Well he was there for a Confirmation. He was not a
3 regular churchgoer, I could tell, so he wanted to be a little
4 defiant and we put him in check.

5 Q Very good.

6 And the, the social interaction that people are
7 really coming to church for nowadays is to be, to gather as a
8 spiritual community and celebrate mass together under the very
9 strict guidelines that the church has put in place, fair to
10 say?

11 A Without a doubt. Without a doubt.

12 Look, I mean a lot of these folks, they want to be
13 in that building. They want to be in that church. They want
14 to go up to the front. They want to kneel down and pray in
15 front of the holy statutes. They want to be in that church.
16 We don't even have Holy Water. Another thing. We've
17 eliminated the Holy Water. The fountains are empty. We've
18 gone above and beyond. I'm telling you.

19 Q Okay. Great. Thank you, Commissioner Esposito. I
20 appreciate the time.

21 MR. SHAPIRO: No further questions from us,
22 Your Honor.

23 THE COURT: Anything further from you, Mr. Farber?

24 MR. FARBER: No, Your Honor.

25 THE COURT: All right. Does the plaintiff have any

1 other witnesses? Mr. Mastro?

2 MR. MASTRO: No, Your Honor.

3 THE COURT: Thank you.

4 All right. At this point, Mr. Farber, do you want
5 to call your witness?

6 MR. FARBER: I do. I would call Bryon Backenson. I
7 believe he is on.

8 THE COURT: Yes, he is here on video.

9 MR. FARBER: Okay.

10 THE COURT: So let's swear in the witness.

11 (The witness is duly sworn/affirmed by the Clerk of
12 the Court under penalties of perjury.)

13 THE COURT: You may proceed, Mr. Farber.

14 MR. FARBER: Thank you, Your Honor.

15 DIRECT EXAMINATION

16 BY MR. FARBER:

17 Q Mr. Backenson, what is your current position?

18 A I'm a research scientist 5 with the New York State
19 Department of Health. I'm the Deputy Director of the Bureau
20 of Communicable Disease Control for the State Department of
21 Health. I'm an Assistant Professor of Epidemiology and
22 Biostatistics at the University at Albany School of Public
23 Health.

24 Q And how long have you been with the State Department of
25 Health?

1 A Twenty-four years. I've been with the Department
2 consecutively now since 2000.

3 Q Can you describe your educational background for the
4 court?

5 A I have an undergraduate degree from Drew University in
6 Madison, New Jersey, a Master of Science in epidemiology and
7 biostatistics from the University of Albany.

8 Q As a general matter, you are familiar with
9 epidemiological issues, is that correct?

10 A I am.

11 Q Can you tell the Court who is Debra Blog?

12 A Debra Blog is the director of the Division of
13 Epidemiology in New York State. She's also the State
14 epidemiologist. There is one designated for each state. Deb
15 Blog is the State epidemiologist for New York. She -- my
16 bureau, the Bureau of Communicable Disease Control, falls
17 under Deb Blog.

18 Q Okay. And do you work with Ms. Blog, Dr. Blog?

19 A I do.

20 Q And in what capacity? What is your relationship with
21 Dr. Blog?

22 A So my group, the bureau of communicable disease control
23 is one of 5 bureaus that work under Dr. Blog. There are about
24 75 or so different diseases in New York State, infectious
25 diseases, that are mandated to be reported to New York State

1 and county health departments and our group basically
2 investigates those as well as other issues that come up that
3 require investigation that may not have made that list quite
4 yet. Basically, what we do is we look, we investigate
5 individual cases of disease and clusters of cases of disease,
6 depending on the pathogen or the disease involved.

7 Q Are you aware that Dr. Blog has filed a declaration in
8 this case?

9 A I am.

10 Q Have you had a chance to review that declaration?

11 A I have.

12 Q Have you had a chance to review the exhibits to that
13 declaration?

14 A I have.

15 Q All right. Is there anything in that declaration that
16 contain any statements that you disagree with?

17 MR. MASTRO: Objection, Your Honor. May I please be
18 heard?

19 THE COURT: Yes, Mr. Mastro.

20 MR. FARBER: I can rephrase.

21 MR. MASTRO: It's not a question of rephrasing. The
22 questioner is leading his own witness, but this witness, you
23 know, he's not in a position, he's not qualified as an expert
24 in the way that the State presented Dr. Blog. He said he's
25 generally familiar with epidemiology and he is now going to be

1 asked to adopt opinions given by Dr. Blog that were really
2 general conclusions that other courts in this state and
3 recently in Washington, D.C. found were conclusory and not
4 based on a sufficient record under Daubert.

5 This is actually trying to not have the real witness
6 here who might actually have been qualified to give an
7 opinion, although challenge it. We have a subordinate who is
8 not a doctor, not a Ph.D., and who's now being asked to adopt
9 in its entirety an affidavit or a declaration over 90
10 paragraphs, 37 exhibits, and he's simply not qualified to give
11 the opinions that are given in the declaration and it is, you
12 know, at its core, putting words in the witness' mouth when
13 the other person should have been here.

14 So, Your Honor, I don't mean belabor the point but
15 we would have objected to opinions being rendered in this
16 conclusory fashion just as the Northern Division of New York
17 rejected the Commissioner of Health doing the same thing in a
18 case in August and a DC district court just did last Friday,
19 but this witness isn't even qualified to give those conclusory
20 results. He read her declaration. Now he's going to say I
21 agree with everything in it? I don't think that's proper
22 testimony, Your Honor, certainly not proper expert testimony.

23 THE COURT: Mr. Farber, you're not providing this
24 witness as an expert on the issues that would require
25 expertise of the type that Dr. Blog may or may not have, are

1 you?

2 MR. FARBER: I'm not offering the witness for
3 Dr. Blog's expertise, Your Honor. I'm offering the witness on
4 the background of this policy, public health practices and
5 other matters with which he is eminently familiar since he
6 works in that area and has worked in that area for many years.

7 MR. MASTRO: Your Honor, may I talk, please?

8 THE COURT: Wait, Mr. Mastro.

9 In that case, why don't you ask him specific
10 questions which relate to his responsibility in his position
11 and leave Dr. Blog's declaration as a separate matter that can
12 be argued about. Dr. Blog did not, is not being presented as
13 a witness and the Court may or may not take her declaration
14 into account in reaching the determination, but I think this
15 witness certainly can speak to certain issues. I have a few
16 questions myself so why don't we go ahead with some specific
17 questions as to issues or --

18 MR. FARBER: Right.

19 THE COURT: -- facts that he has specific knowledge
20 of and then we'll move on from there.

21 MR. FARBER: I will move on, Your Honor.

22 MR. MASTRO: Thank you, Your Honor.

23 THE COURT: Okay.

24 Q Mr. Backenson, can you tell the court what your role in
25 your position with the Department of Health is and New York

1 State's response to the COVID-19 pandemic?

2 A So I over -- in my role, I oversee our case investigation
3 of communicable diseases in New York State. I've been doing
4 that since 2009. I investigate outbreaks and direct
5 individuals to investigate outbreaks across New York State. I
6 am the, I'm the person who people call at 2 in the morning
7 when a physician has a question about a case that they don't
8 know what to do with with regards to reporting that.

9 My first instance with regards to COVID was in
10 January when I wound up getting phone calls with regards to
11 individuals who had recently returned from China and I've
12 worked with other members of the Department ever since in
13 order to help develop some of the surveillance techniques in
14 order to, in order to identify cases, some of the policies
15 involved in trying to address issues when it comes to
16 isolation and quarantine and so forth with regards to this.
17 I've also been directly involved in contact tracing and
18 contact elucidation with all the counties of New York State.

19 Q Okay. And what is the role of your particular section of
20 the division of epidemiology, is it infectious diseases?

21 A It's communicable disease, right. It's the Bureau of
22 Communicable Disease Control and we investigate outbreaks and
23 we try and implement public health measures to help mitigate
24 spread of outbreaks.

25 Q Okay. And what is the role of the Division of

1 Epidemiology in response to the COVID pandemic?

2 A The Division of Epidemiology encompasses five different
3 groups. Ours is kind of general communicable disease. There
4 is a group that deals with hospital-acquired infections.
5 There's a group that deals with tuberculosis. There's a group
6 that deals with communicable disease data. So we're basically
7 broken up by individual subject matter fields, if you will.

8 Q Okay. To your knowledge, how is the SARS-CoV-2 virus
9 transmitted?

10 A It's a respiratory virus. It is transmitted primarily by
11 inhaling particles that have, that are infected with the
12 virus, be them aerosols or be they droplets. They are --
13 again, that's primarily how this happens. There is some
14 indication that there may be some transmission of this through
15 picking up the virus on surfaces and then, you know, wiping it
16 into a mucous membrane like a mouth or an eye. It appears the
17 vast majority of transmission is via the respiratory route.

18 MR. MASTRO: Your Honor, I have to object because it
19 was represented that he wasn't going to try to solicit expert
20 opinion from the witness and he just elicited the witness',
21 you know, opinion about how the virus is transmitted.

22 Your Honor, I didn't hear the witness say and I'm happy to
23 voir dire him on it, I didn't hear him say he considers
24 himself to be an expert on COVID-19. I didn't hear that at
25 all. So he's being called to give testimony about, really in

1 the nature of expert testimony about how the virus --

2 THE COURT: Well, your point is well taken but
3 anyone who's listened over the last eight months to Dr. Fauci
4 has become an expert on how COVID-19 is transmitted. It's a
5 generally understood situation, it would seem, and I'm not
6 taking his statement as an expert statement. It just
7 reinforces what we have been, we have come to understand about
8 the pandemic. There are millions of Americans who are now
9 experts on how COVID-19 is transmitted and then there are a
10 few who have no idea whatsoever.

11 So let's just move ahead. Your point is well taken.
12 I am not going to rely on this witness on that particular
13 issue.

14 MR. MASTRO: Thank you, Your Honor. Let's move on.

15 THE COURT: Yes. Let's move on, please. I'd like
16 to hear more about the specifics of this particular executive
17 order and how it came about, 202.68 which imposed new
18 restrictions in certain neighborhoods in Queens and Brooklyn
19 which is the subject of this application.

20 Okay. Let's go ahead, Mr. Farber.

21 MR. FARBER: Sure.

22 Q Mr. Backenson, can you tell the Court what a COVID
23 cluster is?

24 A Yes. A cluster of COVID is a group of cases that are all
25 related in one way or another. It could be related through an

1 occupational exposure, it could be related through a home
2 exposure, it could be related through some sort of gathering
3 but, basically, it's a link between a number of people who are
4 positive and it's basically, it's, you know -- typically it's
5 assumed to be three or more individuals who are all linked
6 together.

7 Q Can you tell the court what a superspreader event is?

8 A A super spreader event is something where one particular
9 infected individual disproportionately infects a number of
10 other individuals. It is something that we've seen in
11 multiple circumstances with regards to COVID and other
12 illnesses for that matter but, typically, that can be from
13 when one particular individual is in a position where they may
14 be sharing more virus particles than they would, than another
15 individual might, particularly a situation that they might be
16 placed in where people are close together and there are a
17 number of people who may be susceptible to becoming infected
18 but, in general, again, it is one individual
19 disproportionately infecting a number of others.

20 Q Is there a relationship to your knowledge between houses
21 of worship and superspreader events?

22 MR. MASTRO: Objection, Your Honor. Foundation and
23 he's asking him for, again, expert testimony.

24 THE COURT: Sustained.

25 Q Okay. Superspreader events take place, as you just said,

1 when there are large groups of people present, is that fair to
2 say?

3 A Yes.

4 MR. MASTRO: Leading the witness, Your Honor.

5 THE COURT: Go ahead.

6 Q Can you describe the data that was relied on by the State
7 of New York in determining that there were COVID clusters?

8 A These would be the data on human cases as well as the
9 proportion of tests that are testing positive so the number of
10 people getting tested and the number of percentage of those
11 tests that are returning positive within a different time
12 period.

13 Q Are you familiar with what the State is calling the
14 cluster initiative?

15 A I am.

16 Q Can you tell the Court what the cluster initiative is?

17 A So the cluster initiative is a, it's -- first of all,
18 it's an identification of areas of increased incidents of
19 cases in a particular area, particularly compared to other
20 locations, and it's basically a targeted return to some of the
21 techniques that were done when New York went on pause back in
22 March. It's limiting businesses, it's limiting movement, it's
23 basically trying to reduce density in areas where there are
24 large or larger proportions of people who are testing
25 positive.

1 Q Are you familiar with the Governor's executive order
2 number 202.68?

3 A Yes.

4 Q Okay. Are you familiar with the terms "red zone,"
5 "orange zone" and "yellow zone" as set forth in that executive
6 order?

7 A Yes.

8 Q Okay. And briefly, can you say what the red zone and
9 orange zone and yellow zone are?

10 A So these zones are basically ways that, they're -- the
11 individual zones have been set up so that the red zone is an
12 area that has the highest incident of new cases in an area
13 that go through the highest proportion of tests being, coming
14 back positive. Orange is less than that and yellow then is
15 less than that.

16 In each of those, there are a number of different
17 mitigation measures that are taking place. They are
18 temporary. They're there to try and help reduce the spread
19 that had been increasing in those particular areas.

20 They include limits on gatherings from none in the
21 red to 10 in the orange to 25 in the yellow to business just
22 being essential, just essential businesses being open in the
23 red zone to some closing of high risk businesses in the orange
24 zone to all businesses being open in the yellow zone. There
25 are restaurant restrictions from takeout only in the red zone

1 to outdoor dining limited to four at a table only in the
2 orange zone to indoor and outdoor dining limited to four at a
3 table in that yellow zone. Schools are closed in both the red
4 and the orange zones. They're open in the yellow zones but
5 with required testing. And churches are limited in the red
6 zones to 25 percent or 10 -- 25 percent capacity or 10
7 individuals whichever is smaller, the orange zone is
8 33 percent capacity or 25 individuals, whichever is smaller,
9 and in the yellow, it's listed to 50 percent capacity.

10 Q Are you aware of the data that was used in creating these
11 zones?

12 A The data that was used for these was a combination of
13 case data as well as testing data.

14 Q All right. As far as you're aware, the red zones, do the
15 red zones represent, you know, the highest concentration of
16 COVID cases, the orange zones the less highest and the yellow
17 zones the less highest, is that fair to say?

18 A Having looked at the data --

19 MR. MASTRO: Objection, Your Honor.

20 THE COURT: I'm allowing the answer.

21 Go ahead.

22 A Having looked at the data, the zones certainly correspond
23 to the highest incidence rates and the highest testing rates.

24 THE COURT: Let me just ask this. Excuse me,
25 Mr. Farber, if I may.

1 Is your office the office that collects this data
2 and examines and interprets this data? Is that what you do?

3 THE WITNESS: Our office and other offices in the
4 Department of Health collect data. We do analyze data. We do
5 try and clean data to make sure that the data that's being
6 used is, is appropriate and, you know, placed in the right
7 locations and so forth. So, yes, that is what our office
8 does.

9 THE COURT: And in establishing the zones, is it
10 your office that established these zones when they became
11 necessary when the positive test results reached a certain
12 level of positivity, of testing?

13 THE WITNESS: No, Your Honor, my office was not
14 involved in the creation of a threshold for a particular zone
15 if that's what you're asking.

16 THE COURT: Well, then, if not your office, who's
17 office calculates the level of positivity and what needs to be
18 done with a zone a community needs to be placed in?

19 THE WITNESS: These, as I understand it, the
20 creation of the zones were done by the executive office.

21 THE COURT: I know what we're talking about. You
22 mean, the Governor's office, the defendant's office, right?

23 THE WITNESS: Correct.

24 THE COURT: And Mr. Farber, the question is, and I'm
25 sure that you'll asking it eventually on cross-examination,

1 but my question is you're not, you're not providing any
2 witness to elucidate that a certain level of positivity
3 requires a certain level of limiting community activity;
4 that's not why, why this witness is here, I take it?

5 MR. FARBER: That's correct, Your Honor. This
6 witness is going to, you know, testify about the general
7 policy, its reasonableness as a matter of sound
8 epidemiological and public health practice, but he did not,
9 you know, create the specific policy of, you know, X percent
10 do this, X minus Y percent do that. That's not this witness.

11 THE COURT: And he's not an epidemiologist. In
12 other words, he's not the person or group of persons who are
13 being consulted by the Governor as to establishing these,
14 these standards or cutoffs for red zones and orange zones and
15 the yellow zones, correct?

16 MR. FARBER: He's in the group that is. I can't say
17 that he personally is part of that.

18 THE COURT: Well, let me cut to the chase here for a
19 minute. I think that in Dr. Blog's declaration, there was,
20 and correct me if I'm wrong, Mr. Farber, a representation that
21 the red zone consists of a positivity rate of at least
22 8 percent. Is that your understanding?

23 MR. FARBER: That is, that is my understanding. I
24 think that, I think that's an approximation and I think
25 that's --

1 THE COURT: Okay.

2 MR. FARBER: -- that's an average but I think that's
3 correct. I think that's correct.

4 THE COURT: Well, it was brought to my attention
5 this afternoon that the Governor held a press conference at
6 11:30 this morning at which he indicated that the numbers show
7 that there are, the positivity rate in the red zone is
8 4.84 percent at present. Are you are of this?

9 Do you have a witness who can talk about what's
10 going on with the positivity rate and how that might affect
11 this litigation?

12 MR. FARBER: I, you know, I am not, I am not aware
13 of that, Your Honor. And the witness I, you know, the witness
14 I have today is, you know, can address it if he knows.

15 I can tell the Court that Dr. Blog herself
16 unfortunately had a medical issue. I don't know, you know,
17 her availability, for example, for tomorrow but, you know,
18 that's what I have. Unfortunately, Your Honor, we're in
19 difficult circumstances, you know, as we indicated in our
20 letter so, you know, we're, we're all, you know, in a
21 difficult position. You know, we are dealing with this.

22 THE COURT: Mr. Farber. Mr. Farber.

23 MR. FARBER: Yes.

24 THE COURT: This was scheduled -- this hearing was
25 scheduled over the weekend. All right.

1 MR. FARBER: Yes, Your Honor.

2 THE COURT: And the Governor is giving, is giving a
3 press conference this morning and the numbers that he
4 apparently, you can correct it, I'm not saying this is, this
5 is just hearsay on my part, but it's valuable here since we're
6 trying to figure out what to do here. He's now saying that
7 the red zone is now under 5 percent and that's what I'm,
8 that's what I'm understanding from this press conference that
9 he had.

10 This is a court. I don't go to press conferences.
11 So, you know, I think it is important for your client to be
12 able to tell you what the latest move is so that we can have
13 an up to date understanding of what's going on with regard to
14 this COVID outbreak which I do not minimize in any way, shape
15 or form, you understand. I'm just trying to get the latest
16 picture that is available so that if it is useful, if it is
17 useful in what we are doing, at least we will have it and be
18 able to consider it.

19 So I'm going to let you go ahead.

20 MR. FARBER: Okay.

21 THE COURT: I just point that out to you and ask you
22 to provide any additional information by tomorrow morning at
23 9 o'clock --

24 MR. FARBER: Yes, Your Honor.

25 THE COURT: -- on this subject and possibly some

1 sort of declaration by someone who is crunching the numbers as
2 to how this might affect all these zones that have been
3 created and affect the rights of the plaintiff in this case
4 and the parishioners of the Roman Catholic Diocese of
5 Brooklyn.

6 So having said all that, you can go back to your
7 questioning of the witness. Thank you.

8 MR. FARBER: Thank you, Your Honor.

9 Q Backenson, are you familiar with the term "nonessential
10 gatherings"?

11 A Yes.

12 Q Okay. And are you familiar with how Executive Order
13 202.68 treats nonessential gatherings in the red and orange
14 zones?

15 A Yes.

16 Q How does it treat them?

17 A Gatherings are -- there are no nonessential gatherings in
18 the red zone and gatherings are limited to ten or less in the
19 orange zone.

20 Q Okay. And are you familiar with the term "essential
21 business"?

22 A Yes.

23 Q All right. And can you please describe that term in the
24 context of Executive Order 202.68?

25 A Essential businesses have been defined earlier, in

1 earlier executive orders as businesses that are, that are
2 allowed to remain open because they provide essential services
3 to the State and to New Yorkers. And with regards to those,
4 and this particular executive order, essential businesses are
5 allowed to stay open when in the red zone, other businesses
6 must close; in the orange zone, they are open, there are
7 personal care and other high risk businesses that are, that
8 should be closed; and in the yellow zone, there's no
9 restrictions.

10 Q Okay. The plaintiff has offered us, the plaintiff
11 offered evidence that the church officials are not aware of
12 COVID outbreaks from its churches in red and yellow zones and
13 that the church has imposed its own hygiene, social
14 distancing, masking mitigation measures.

15 In your view as a epidemiologist with New York
16 State, is that, in your view, an adequate public health
17 measure?

18 MR. MASTRO: Objection, Your Honor. And it's
19 also --

20 THE COURT: No. I'm allowing it. Go ahead.

21 A So the measures that have been undertaken were, are
22 certainly appropriate with regards to the phased entry that
23 has happened starting in mid May. What we're trying to do now
24 is trying to have a targeted approach to try and address areas
25 that have extraordinarily high rates of positivity. It may --

1 in situations like this, taking additional steps in order to
2 try and minimize spread and minimize risk to other individuals
3 and potentially trying to stop spread from catching hold in
4 certain areas is appropriate.

5 Q All right. And plaintiff, plaintiff argues that it
6 actually has lower capacity than the State requires in its
7 churches. It's at a maximum of 25 percent capacity and when
8 in cases, the State permits 33 or even higher.

9 Why, again, as an epidemiologist with the State of
10 New York, would it be of concern if the churches in the red
11 and orange zone continue to operate at 25 percent capacity?

12 MR. MASTRO: Same objection, Your Honor.

13 THE COURT: Your objection is noted.

14 You may answer.

15 A It is -- I mean, I think the main concern again is not
16 what actions the church has taken, but the actions that are
17 around the church and the individual, the increasing rate of
18 positivity in the communities surrounding it. It's a concern
19 about then potential spread inside, inside this particular
20 church, potential spread to other people outside the
21 community.

22 The goal of COVID mitigation is to try and keep
23 COVID numbers as small as possible because as we've seen in a
24 number of situations in New York and nationally and
25 internationally for that matter, this is a disease that can

1 spread very, very quickly both in terms of time and a place.

2 Q Are you familiar with the CDC's guidance for community
3 mitigation where there are high positive, positivity COVID
4 rates in a given area?

5 A Yes.

6 Q And can you describe what the CDC's guidance is for such
7 community mitigation?

8 A In short, the CDC takes escalating steps as they're
9 increasing rates of number of cases and of incidence rates in
10 particular areas. So if incidence rates or positivity rates
11 or a combination of both as we're doing here increases in a
12 particular area, CDC would recommend that additional steps get
13 taken in order to try and prevent future spread, particularly
14 in areas of high density.

15 Q Okay. And I'm nearly, nearly done here.

16 Can you explain what you meant concerning density?

17 A Sure. So density is a -- one of the main concerns about
18 the spread, transmission of COVID involves density. The main
19 concern that we have is when there are a number of people
20 present, that it's much easier for one person to infect more
21 than one individual.

22 What we want to do as epidemiologists, as public
23 health professionals is try and, whenever there is a case, we
24 want to have fewer than one case, have that person transmit to
25 fewer than one individual. That's a term called the

1 reproductive rate. And so one of the things that we -- one of
2 the best ways to do that is to limit the number of people that
3 a positive individual is --

4 THE COURT: Hold on. Hold on a minute.

5 There is someone who's on a telephone call in the
6 middle of this proceeding and it's very distracting. So
7 either hang up the phone or terminate your involvement in this
8 proceeding.

9 THE CLERK: Judge, I can mute everybody but I was
10 just going to wait.

11 THE COURT: Thank you very much.

12 I'm sorry to interrupt, sir. Please complete your
13 statement.

14 THE WITNESS: Certainly.

15 A So density is important, basically, in trying to limit
16 the number of people that one individual can potentially
17 transmit to. It's why we went on pause back in March. It is
18 why we are, we recommend masking and social distancing. It's
19 why we have certain limits for gatherings, why we have
20 staggered workplaces, why we have staggered school settings,
21 why we have no fans in stadiums. It basically is trying to
22 prevent events where one or two positive individuals who may
23 or may not know that they are ill or positive can potentially
24 give this to many, many other people at once.

25 Q Okay. Thank you, Mr. Backenson.

1 MR. FARBER: That actually concludes my direct.

2 THE COURT: All right. Thank you, Mr. Farber.

3 Cross-examination?

4 MR. MASTRO: Yes, Your Honor. Thank you,
5 Your Honor.

6 THE COURT: Introduce yourself to the witness.

7 MR. MASTRO: Yes.

8 CROSS-EXAMINATION

9 BY MR. MASTRO:

10 Q Mr. Backenson, I have a few questions. I look forward to
11 doing this as quickly as possible. First --

12 THE COURT: This is Mr. Mastro.

13 MR. MASTRO: Yes.

14 THE COURT: All right. Go ahead, Mr. Mastro. I
15 introduced you to the witness.

16 MR. MASTRO: Thank you. I'm sorry.

17 Q Mr. Backenson, I did see you went to Drew University. I
18 hope you took my father's course, Dr. Julius Mastro?

19 A Unfortunately, I spent all my time in biology classes but
20 I am familiar with your father, yes.

21 Q Well, God rest his soul. He was a great, great professor
22 and a great father.

23 So, Mr. Backenson, just to clarify, you didn't speak
24 to the Governor about the executive order that's at issue in
25 this litigation, did you, sir?

1 A I did not.

2 Q You didn't speak to the Executive Office about what that
3 particular executive order should say, did you, sir?

4 A Before it was created?

5 Q Yes.

6 A I wasn't.

7 Q So you were not consulted in any way on what that
8 executive order should say, the parameters that were defined;
9 you had nothing to do with that, correct?

10 A I did not.

11 Q You had nothing to do with what geographic areas
12 qualified as red zones, did you, sir?

13 A I did not.

14 Q Or orange zones or yellow zones for that matter, correct?

15 A No, sir.

16 Q And you had no role in defining how this executive order
17 restricted houses of worship in those zones, correct, sir?

18 A Correct.

19 Q And you said the, those decisions about which areas
20 qualified for which zones, they were made in the Governor's
21 office, correct?

22 A To my knowledge.

23 Q And, sir, who in the Governor's office, the Governor's
24 office specifically, is, in fact, an epidemiologist? Is there
25 is any?

1 A I do not know, sir.

2 Q Who in the Governor's office is a doctor or a scientist
3 who specializes in infectious disease, do you know, sir?

4 A I do not know, sir.

5 Q Is it typical in your experience that -- strike that.
6 Strike that.

7 Are you aware that the Governor announced today that
8 the test results as of yesterday for red zones are down to
9 4.84 percent positivity? Are you aware of that, sir?

10 A I heard it earlier in this, here.

11 Q But you said your job is tracking trends and rates,
12 right? Didn't you say that earlier?

13 A The role of our unit is, yes.

14 Q So are you aware that the test results reported yesterday
15 for red zones are down to 4.84 percent positivity? You're
16 aware of that?

17 A I'm aware that the rates have lowered. I was not aware
18 of the specific number for this specific region in, in -- I'm
19 unsure if the term you're talking about is for all the red
20 zones or just one in particular.

21 Q Sir, I want to ask you a few questions.

22 You said this executive order, they put this
23 together in the Governor's office, right?

24 A That is my, that's my, that is my understanding.

25 Q Yes. Thank you. I want to ask you the following

1 questions.

2 Are you aware that the Governor has said publicly
3 that his latest, that as to his latest executive order, "The
4 issue is with the ultra-Orthodox community"? Are you aware
5 the Governor said that publicly, sir?

6 A I am not.

7 Q Do you agree with the Governor that "the issue is with
8 the ultra-Orthodox community"? Sir, do you agree that's the
9 issue? Yes or no.

10 A The, the issue, I believe, is more so with a --

11 Q Yes or no, sir. Yes or no, please.

12 THE COURT: I'll allow him to answer.

13 MR. FARBER: I'm going to object -- okay.

14 THE COURT: I'm going to allow him to answer.

15 We'll take your answer on that, please, sir.

16 A No.

17 Q Am I correct that the cluster that you're referring to in
18 these red zones is, as the Governor has said, predominantly an
19 ultra-Orthodox cluster"? Do you agree with that?

20 A These are areas that have a high population of Orthodox
21 population.

22 Q So you agree with that, correct?

23 A These zones are --

24 THE COURT: I'm sorry. You can finish your answer.
25 Go ahead.

1 A These areas are areas that do have a high proportion of
2 the Orthodox population.

3 Q And do you agree, sir, that the ultra-Orthodox community
4 in these neighborhoods is an insular community?

5 MR. FARBER: Objection.

6 THE COURT: Sustained.

7 Q Do you agree, sir, that the ultra-Orthodox community in
8 these neighborhoods tends not to interact with its neighbors?

9 MR. FARBER: Objection.

10 THE COURT: Sustained.

11 Q Sir, you said in your testimony that one of the things
12 that you do is contact tracing, right?

13 A Correct.

14 Q Have you attempted to do any contact -- contract -- have
15 you attempted to do any contact tracing work in connection
16 with these clusters in these red zones in Brooklyn?

17 A I have not. That's the jurisdiction, that's the
18 jurisdiction of the New York City Health Department.

19 Q Am I correct, sir, that the New York State Health
20 Department has jurisdiction to enforce the government's
21 executive orders?

22 MR. FARBER: Objection.

23 THE COURT: No, whether he knows. If he knows.

24 MR. FARBER: Okay.

25 THE COURT: Do you know?

1 THE WITNESS: Yes.

2 A Yes.

3 Q Sir, do you know whether the Department of Health, the
4 State Department of Health has taken any steps to enforce the
5 Governor's executive order at issue here in relation to COVID
6 cluster in the ultra-Orthodox community in these Brooklyn red
7 zone neighborhoods? Do you know whether the Health Department
8 has done that?

9 A I do not.

10 Q Now, sir, I want to also ask you the following.

11 You were here listening to the testimony of
12 Bishop Chappetto and Commissioner Esposito, correct?

13 A Correct.

14 Q And you heard Commissioner Esposito say that to his
15 knowledge, there have not been any outbreaks of COVID-19
16 stemming from any Catholic church or congregation in New York
17 City including Brooklyn or Queens.

18 Did you hear his testimony on that score, sir?

19 A I did.

20 Q And as far as you know, that's true and correct
21 testimony, right, sir?

22 A Clusters in, outbreaks in New York City are the
23 jurisdiction of the New York City Department of Health. There
24 may be ones that I am not privy to.

25 (Continued on the following page.)

1 CROSS EXAMINATION

2 BY MR. MASTRO: (Continuing.)

3 Q And as far as you know, that's true and correct
4 testimony; right, sir?

5 A Clusters in -- outbreaks in New York City are the
6 jurisdiction of the New York City Department of Health.

7 There may be ones that I'm not privy to.

8 Q Sir, a simple question. Commissioner Esposito said that
9 to his knowledge there hasn't been any outbreak or spread of
10 COVID 19 in any of these catholic churches in Brooklyn or
11 Queens. As far as you know, he's correct, there hasn't been
12 any spread or outbreak of COVID-19 in any of the diocese's
13 churches; correct?

14 A To the best of my knowledge, there have been no outbreaks
15 specifically originating in a church in this particular
16 diocese, however, that is the jurisdiction of New York City
17 Department of Health for investigation.

18 Q But it's the State, the Governor who imposed this
19 executive order; right, sir?

20 A Correct.

21 Q Now, sir, you mentioned the CDC --

22 MR. MASTRO: Your Honor, I'm having such a good
23 time. I see my battery is running low and I need my experts
24 to help me make sure I get it plugged in and that's my wife.
25 Can I please have a very brief break so I make sure she plugs

1 in the batteries so I do not lose power here.

2 THE COURT: All right. Let's take a two-minute
3 break to plug in Mr. Mastro's battery.

4 MR. MASTRO: Thank you, Your Honor, much
5 appreciated. My technical skills are lacking.

6 THE COURT: That's apparent.

7 (Brief recess.)

8 MR. SHAPIRO: Mr. Mastro just called me.

9 THE COURT: I'm sorry.

10 MR. SHAPIRO: He is trying to get back on.

11 THE COURT: I don't know what we are getting right
12 now.

13 MR. SHAPIRO: Your Honor, Mr. Mastro called me and
14 his computer had died, so he is trying to get back on as
15 quickly as possible. He said in a few more minutes, I
16 apologize.

17 THE COURT: That's all right. We will know when he
18 is back.

19 Everyone should remain muted except the speaker.

20 Is there any word from Mr. Mastro?

21 MR. SHAPIRO: I'll try calling him again, Your
22 Honor.

23 THE COURT: Mr. Farber, you are still there, I take
24 it? Mr. Farber?

25 MR. SHAPIRO: If there is a way for Mr. Mastro to

1 continue the cross by phone, he would do that.

2 THE COURT: That would be fine. I will be happy
3 take his cross by phone, but I'm also looking for Mr. Farber.

4 MR. SHAPIRO: Is there a number that he should use,
5 Mr. Reccoppa, for calling so that he can speak?

6 THE COURTROOM DEPUTY: 571-353-2300. Then he enters
7 798200928. That's the dial in number.

8 MR. FARBER: Can you hear me?

9 THE COURT: Mr. Farber?

10 MR. FARBER: Yes, Your Honor.

11 THE COURT: I'm glad you are back. We are still
12 waiting. Mr. Mastro is going to call in because he is having
13 trouble with his computer.

14 MR. FARBER: He has my sympathies.

15 THE COURT: Yes, I understand that. Thank you for
16 your patience, everyone.

17 MR. MASTRO: Am I back?

18 THE COURT: You are back. Please sit down.

19 MR. MASTRO: My perfuse apologies to the witness
20 and, Your Honor.

21 THE COURT: All right. You have to promise me you
22 will have a heart-to-heart conversation with the IT department
23 at Gibson Dunn before you do another one of these.

24 MR. MASTRO: I promise, Your Honor. I'm still using
25 a Blackberry.

1 THE COURT: Some people say that's the way to go.
2 Okay.

3 MR. MASTRO: Thank you, Your Honor.

4 THE COURT: Let's finish up with this witness,
5 please. Try to get it done.

6 MR. MASTRO: I will, Your Honor. I don't have that
7 much longer, Your Honor.

8 BY MR. MASTRO:

9 Q Sir, you were asked questions about CDC policies --

10 THE COURT: I hate to do this, but I see the sun
11 light coming through.

12 THE WITNESS: Wrong window.

13 THE COURT: I don't know if that's the sunlight or
14 someone up speaking to you, sir.

15 That's better. Thank you very much, sir. Go ahead,
16 Mr. Mastro.

17 MR. MASTRO: Thank you. Thank you, Your Honor.

18 Q Sir, you were asked some questions earlier about your
19 familiarity with the CDC's recommendations. Do you remember
20 that testimony?

21 A I do.

22 Q And, sir, you know that the CDC recommends keeping,
23 quote, at least six feet away from other people, end quote, as
24 one of their recommendations in connection with COVID;
25 correct?

1 A Correct.

2 Q And the diocese's churches are doing just that; correct?

3 A From their testimony, it appears that way.

4 Q Thank you.

5 And you're aware that the CDC recommends that social
6 distancing, quote, is one of the best tools we have to avoid
7 being exposed to the virus and slowing its spread locally, end
8 quote? You are aware of that, sir?

9 A Yes.

10 Q And that's exactly what the diocese's churches are doing,
11 social distancing?

12 MR. FARBER: Objection.

13 THE COURT: Sustained. Let's move on. It's been
14 asked and answered.

15 Q Sir, are you also aware that the CDC put out expressed
16 guidance as to considerations in connection with communities
17 of faith?

18 A Yes.

19 Q And that's attached as Exhibit BB to the Blog
20 declaration; correct?

21 A Yes.

22 Q You are aware that the CDC expressly says that, quote,
23 its guidance is not intended to infringe upon rights protected
24 by the First Amendment to the U.S. Constitution; correct?

25 MR. FARBER: Objection.

1 THE COURT: You may answer.

2 A I believe that is -- I believe that's what the guidance
3 says.

4 Q And that, quote, No faith community should be asked to
5 adopt any mitigation strategies that are more stringent than
6 the mitigation strategies as to similarly-situated entities or
7 activities, end quote, you are aware of that; correct?

8 A That is what it says. Correct.

9 Q Now, sir, I want to ask you about some of the other
10 activities from the other businesses and services that are in
11 red and orange zones that aren't restricted in any way.

12 Mr. Farber asked you about what has been categorized
13 as essential businesses or services, and you said you were
14 familiar with those; correct, sir?

15 A Correct.

16 Q And I'm referring you specifically to Mastro declaration,
17 Exhibit 5, and from the State entitled "Guidance for
18 determining whether a business enterprise is subject to
19 workforce reduction under recent executive orders."

20 Sir, you'll see there on the first page it describe
21 essential businesses or entities; correct?

22 A I'm actually trying to find it. Supplemental declaration
23 five?

24 Q No, my first declaration, declaration of Randy Mastro,
25 Exhibit No. 5.

1 A Okay. I'm sorry.

2 Q I'm referring you specifically, sir, to page 4, essential
3 retail.

4 Now, essential retail, that means even in the red
5 zones, they're not subject to any restrictions at all;
6 correct?

7 A They are. They are subject to restrictions. They are --
8 masking and social distancing is part of that. They are not
9 subject to --

10 Q There is no --

11 THE COURT: Do not over speak the witness.

12 Go ahead, sir.

13 A They are not subject to -- to density restrictions, yes.

14 Q So among those essential retail businesses are grocery
15 stores, including all food and beverage stores; correct, sir?

16 A Correct.

17 Q Does that mean liquor stores too, sir?

18 A Liquor stores have been considered to be essential,
19 correct.

20 Q Liquor stores.

21 How about convenience stores? They're also
22 considered essential?

23 A Correct.

24 Q Hardware, appliance, and building material stores;
25 correct, sir?

1 A Correct.

2 Q Pet food; correct?

3 A Correct.

4 Q Sir, you are aware that there is a Target store in one of
5 these red zones in Brooklyn; correct?

6 A Correct.

7 Q And that's an essential business? They sell food and
8 other related items? Target is an essential business;
9 correct?

10 A Correct.

11 Q And Target is a big box store, very large; correct?

12 A Correct. I'm not familiar with the square footage of
13 this particular one, but I know compared to other Targets,
14 yes.

15 Q So that Target store can literally have hundreds of
16 people shopping there on any given day, there's no capacity
17 restriction; correct?

18 A Correct.

19 Q Staples, Staples is a hardware store; right?

20 A No. Staples is a stationery store.

21 Q Staples also has hardware materials, appliances, things
22 like that. Staples would be considered an essential business;
23 correct?

24 A To be honest, I believe it would. But to be honest, I'm
25 trying to remember if the Staples by me was closed during the

1 unessential business period.

2 Q So, sir, you wouldn't be surprised to learn that the
3 Staples in one of these Brooklyn red zone neighborhood is open
4 today for business; right?

5 A I would not.

6 Q And operating without any capacity restriction; correct?

7 MR. FARBER: I'm going to object to this line.

8 THE COURT: Overruled. You may continue.

9 A Correct.

10 Q Staples is a big box store with hundreds of customers at
11 a time; correct?

12 A Correct.

13 Q Now, sir, I want to ask you, flip to the next page,
14 because it describes financial institutions as essential, and
15 listed there are banks, insurance, payroll, accounting, even
16 services related to financial markets, like your broker,
17 right? They are considered essential businesses?

18 A Correct.

19 Q And they've stayed open; correct? No restriction on
20 capacity?

21 A Correct.

22 Q And there you have staff working in close quarters,
23 sometimes even confined spaces, members of the public going
24 there for those services in confined spaces; correct?

25 A Depending on the institution.

1 Q Correct, right?

2 A Correct.

3 Q Now, sir, once again I am going to ask you about
4 something the Governor said. Would you agree that this
5 executive order restricting services in all houses of worship
6 in these red and orange zones is, quote, Not a highly nuanced,
7 sophisticated response, end quote? Do you agree with that?

8 A So -- I'm sorry, can you repeat the question.

9 Q Sure. Do you agree with the statement that the
10 Governor's executive order restricting services of all houses
11 of worships in certain geographic zones is, quote, Not a
12 highly nuanced, sophisticated response, end quote?

13 A I'm sorry, do I -- do I need to know who the -- who the
14 quote is?

15 Q It's a quota attributed to the Governor on October 6,
16 2020.

17 A Okay. I would argue that -- I'm sorry.

18 Q Pardon? Please, go ahead.

19 A Was there an objection made or something like that? I'm
20 sorry?

21 THE COURT: You can't ask your lawyer to make an
22 objection. That's not.

23 THE WITNESS: I wasn't sure. I just heard cross
24 talking.

25 THE COURT: Just answer the question, if you can.

1 That's all.

2 THE WITNESS: I just heard cross talk. I wasn't
3 sure.

4 A So I think I would disagree. I mean, I think this has
5 been a targeted approach to -- to areas that have had high
6 incidence rates. It is intended to be targeted and intended
7 to be temporary.

8 Q Would you agree with the statement attributed to the
9 Governor that this is not a policy being written by a scalpel,
10 this is a policy being cut by a hatchet, end quote? Would you
11 agree with that?

12 A I would not.

13 Q Would you agree with the statement attributed to the
14 Governor that if we can get the numbers down in the zip codes,
15 the anxiety comes down and we can have a smarter, more
16 tailored approach"? Do you agree with that?

17 A There's a lot to unpack there.

18 In general, I mean, I think the goal here is to
19 reduce the rates, the incidence rates, the percent positive
20 test rates in the zones that have been identified so that we
21 can remain open.

22 The point here is I think that this is a targeted
23 temporary action that is being put into place in order to try
24 and prevent spread before this -- before the infection kind of
25 takes hold again in certain areas of the state.

1 Q And, sir, it's your testimony that -- strike that.

2 You would agree that what the diocese has done
3 voluntarily, limiting its church masses to 25 percent of
4 capacity, wearing masks, social distancing at least six feet
5 apart, having extra precautions taken around the holy
6 communion, extra steps taken about entering and exiting to
7 promote social distancing during -- before and after the mass,
8 you would agree that all of those things are things that those
9 catholic churches should be doing; correct?

10 A Correct.

11 Q You would also agree, would you not, that the offer, in
12 the context of this preliminary injunction application, to not
13 have congregations singing and to make sure that the cantor is
14 always 12 feet away from anyone else, that that also is
15 something that promotes safety in the catholic churches;
16 correct?

17 A Eliminating risky behaviors always helps, correct.

18 Q And, again, you personally are not aware of any evidence
19 of any spread of COVID in any of the catholic churches in this
20 diocese; correct, sir?

21 A In this diocese, in catholic churches, correct.

22 Q And would it be fair to say based on the things that this
23 diocese has been doing in its churches and has offered to do
24 going forward, that its doing all the right things to prevent
25 the spread of COVID in its churches? Would that be fair to

1 say?

2 A I think they are doing things to try to prevent spread
3 among congregants who come to the churches, yes.

4 Q And they're succeeding, for the past three months, no
5 incidents of COVID; correct?

6 A I don't know of no incidents of COVID. We know of no
7 outbreak, but it certainly does not mean that there may not be
8 people who have tested positive.

9 Q Since there has been no outbreak or spread, even if there
10 had been a congregant who tested positive that necessarily
11 means that the measures that have been taken protected the
12 rest of the congregation from outbreak or spread; correct,
13 sir?

14 MR. FARBER: I'm going to object.

15 THE COURT: Sustained.

16 MR. MASTRO: Your Honor, I don't have any further
17 questions of this witness at this time. Thank you.

18 THE COURT: Mr. Farber, anything else from you?

19 MR. FARBER: I have a brief recross, Your Honor.

20 THE COURT: Please go forward.

21 MR. FARBER: Thank you, Your Honor.

22 THE COURT: I'm sorry. That's a redirect, right?

23 MR. FARBER: Yes. Redirect. I'm sorry, Your Honor.
24 I forgot where I am.

25 THE COURT: Okay, go ahead.

1 MR. FARBER: A few redirect questions. My
2 apologies.

3 REDIRECT EXAMINATION

4 BY MR. FARBER:

5 Q Mr. Backenson, Mr. Mastro just asked you -- he described
6 for you a number of measures taken by churches in the diocese,
7 social distancing, masking, reduced singing, changes to the
8 service.

9 In the context of an area undergoing an increase in
10 COVID cases, are the measures Mr. Mastro described sufficient
11 in your view as an epidemiologist?

12 A The measures described are the measures -- I'm sorry.

13 MR. MASTRO: Your Honor, I object.

14 THE COURT: He may answer.

15 A The measures described are measures that have been
16 recommended to churches throughout New York State and many, if
17 not all churches, are -- many of them are implementing them.

18 Having -- in an area of increased risk, the same --
19 you know, additional measures may be needed in order to try to
20 minimize spread from the community, throughout the community.

21 Q Okay. Now, Mr. Mastro asked you about a variety of
22 stores. He has Target, Staples, and some other ones in there.

23 As an epidemiological matter, are those situations
24 the same as a church service in your view?

25 A In many cases --

1 MR. MASTRO: Objection, Your Honor. Objection this
2 is not even --

3 THE COURT: Overruled. You can ask on recross. Go
4 ahead.

5 A In many instances, they may not be. The retail
6 establishments are often go in, pick something up, leave.
7 Being in, you know, one of these establishments for a very
8 short period of time, oftentimes with -- where people are not
9 doing things like, you know, talking, singing, chanting,
10 things of that nature. So in some ways they are very
11 different.

12 THE COURT: Sir, have you ever been in a Trader
13 Joe's?

14 THE WITNESS: I have.

15 THE COURT: Go ahead.

16 THE WITNESS: Right. I can't -- I will not say that
17 all of them will be. But, you know, going in a Trader Joe's
18 is certainly different than going into, you know, my local
19 Staples or my local hardware store. You know, they're
20 definitely -- the Trader Joe's where I live still has a line
21 around the block because they are restricting entry and
22 limiting the number of people that are inside at any given
23 time.

24 THE COURT: But for Trader Joe's the State isn't
25 doing an inspection as to the circulation of air in the Trader

1 Joe's, with lots of people coming and going even if there is a
2 certain restriction of the number, there is not a restriction
3 on how long they can stay inside and how many aisles they can
4 go in, and so forth. The Trader Joe's, for instance -- and
5 that's not about a big supermarket -- will have a certain
6 amount of activity over a long period of time by any given
7 individual and there are the epidemiological issues having to
8 do with the circulation of air and the circulation of people,
9 and there's no regulation of that in the state, right?

10 THE WITNESS: Correct, because it's been deemed an
11 essential business. Risk and -- I'm sorry?

12 THE COURT: Right. And so you enter one of these
13 facilities at your own risk, basically?

14 THE WITNESS: Correct. And risk is typically a
15 function of distance and time. So it's a function of your
16 distance to somebody who is positive to be able to be exposed
17 to that air and/or how long you are exposed to that particular
18 individual as well. It's how we define contact through a
19 particular case.

20 THE COURT: Does the State have any rules regarding
21 providing early shopping for senior citizens in some of these
22 more crowded venues that are not subject to other rules? In
23 other words, from just to 7:00 a.m., if you are a senior
24 citizen, you can go in and do your shopping to the exclusion
25 of other people so that you maintain social distancing and

1 limit the number of people in the facility, does the State
2 have rules about that?

3 THE WITNESS: To the best of my knowledge that is
4 something that is voluntarily being implemented by stores
5 themselves as opposed to there being a specific suggestion or
6 regulation from the State.

7 And the other thing, with grocery stores it's -- my
8 particular grocery store that I go to, for example, has all
9 sorts of arrows on the ground and they say that put it in a
10 layout of how people are supposed to flow through the store,
11 but they clearly do not. So sometimes what businesses say is
12 being done in order to try, you know, prevent spread may not
13 necessarily be followed by their customers no matter what the
14 business or industry may be.

15 THE COURT: These are steps that are implemented by
16 the store voluntarily to help maintain social distancing, but
17 it's not something that the State has mandated?

18 THE WITNESS: There definitely are suggestions that
19 are put in in terms of the right way in terms of people flow,
20 and so forth. But it's not -- I don't think there's a
21 mandate, enforcement of any of that.

22 THE COURT: All right. Thank you.

23 Do you have more, Mr. Farber?

24 MR. FARBER: Very brief, Your Honor.

25 THE COURT: Go ahead.

1 BY MR. FARBER:

2 Q Mr. Mastro asked you about alleged prior outbreaks or
3 prior infections at the churches in the diocese. I believe
4 this concerned the three or four months prior to the discovery
5 of the COVID clusters. Are you aware of that?

6 A I believe so. I think the -- the identification of the
7 most recent clusters of the zones, is that what you're getting
8 at?

9 Q Yes. When was the most recent timing of the most recent
10 clusters?

11 A I'm sorry. I'm not understanding your question.

12 Q I'm sorry. My fault.

13 Do you recall when the clusters that resulted in the
14 cluster initiative were identified?

15 A Yeah. These were based on rolling averages of -- I
16 believe it's seven days of data. So, seven previous days of
17 increasing rate -- of increasing incidents and rates of
18 positive test results.

19 Q Do you recall in what month these clusters were
20 discovered?

21 A September.

22 Q What were the State's overall positivity rates in the
23 three months before that, in June, July, August?

24 A Approximately one percent. On some days it was as low as
25 .6 or .7 percent.

1 Q So, in fact, it would be -- so during that period, it
2 would not be particularly surprising to you if a number of
3 churches or a great number of churches did not report
4 outbreaks of COVID-19?

5 A Correct. It seemed that there was less virus circulating
6 in the community at that point in time as well.

7 Q And, in fact, is the fact that there were no prior
8 outbreaks relevant with respect to a situation where clusters
9 do develop in these given areas?

10 A It is more difficult to -- it's less likely to have an
11 outbreak or a cluster if there's less virus circulating in the
12 community.

13 Q So in your view, if there's more virus circulating in the
14 community, there is more likelihood of an outbreak? Is that
15 fair to say?

16 A Correct.

17 Q Okay. And as far as you know, the areas designated red,
18 orange, yellow, do, to the best of your knowledge, reflect
19 data points showing higher incidents of COVID-19; is that
20 correct?

21 MR. MASTRO: Objection to form. Leading his own
22 witness.

23 THE COURT: You may answer.

24 A From the data I've seen, the clusters reflect the
25 geographic distribution of higher incidence rates.

1 THE COURT: Have you ever heard of micro clusters,
2 sir?

3 THE WITNESS: Sure.

4 THE COURT: Now, apparently, the Governor takes the
5 position that the orthodox community is not following red zone
6 rules, and that, for the most part, they never followed
7 general rules, even though the orthodox community is trying to
8 be cooperative according to the Governor.

9 Is that your understanding of what's going on in the
10 orthodox community?

11 THE WITNESS: I've had experience with the orthodox
12 community in the past and they can be a very difficult
13 community to deal with. I think our main concern here is
14 trying to prevent, you know -- if there is illness circulating
15 in a portion of a community, I think our concern is trying to
16 prevent it from spreading into other areas of the community.

17 THE COURT: I see.

18 THE WITNESS: We've seen this in other parts of the
19 State where we have had, you know -- I'm working on outbreaks
20 now in the southern tier of New York where we had clusters
21 associated one with a church, one with a bar and that have
22 basically led to broad non-cluster community outbreaks across
23 the entirety of three counties. That's what we're trying to
24 prevent here. We're trying to prevent a small group of people
25 that are all connected to one another to turning into a large

1 group of people that may be not as connected with one another.
2 That's where the virus sort of gets a foothold in a particular
3 area and it's sort of difficult to sort of squash it back out
4 again.

5 I'm a little concerned that that has happened in
6 some cases in parts of the southern tier already, and part of
7 these rules are to try and see if there is a way to minimize
8 that here in portions of New York State.

9 THE COURT: I see. Well, take these numbers and
10 tell me what you think, according to the information that I
11 have from the Governor's press conference today, as I
12 mentioned earlier, it is recorded that 4.84 percent positivity
13 rate in the red zone overall, .99 outside the red zone, and an
14 overall aggregate of 1.09 percent, if that's the case, would
15 you be recommending an adjustment of the limitation based upon
16 what appear to be a reduction from eight percent of positivity
17 in the red zone? Is this something that you would recommend
18 or might recommend to your superiors to recommend to the
19 Governor?

20 THE WITNESS: I think -- so hearing that data, it
21 makes me think that some of -- since this has gone on for
22 approximately 10 days or so now, it makes me think that some
23 of the targeted steps in red zones areas may be having an
24 impact and that the steps that were taken to reduce density,
25 to try and keep people from being in as much contact with one

1 another as they were maybe 15 days ago is supposed to
2 potentially having an impact.

3 It does show that there still remains a problem in
4 this particular area. The fact that we can look outside this
5 particular area and see that, you know, roughly one percent
6 rate that we've seen pretty consistently for the past several
7 months, what we would like is we would like this community to
8 go back to that one percent rate that we're seeing in areas
9 sort of outside the red zone.

10 So I think the goal of all this was to try to have
11 it be something targeted so that it disrupted the least amount
12 of people but large enough so that you can actually make an
13 important impact to try and reduce that incidence rate.

14 THE COURT: I had one other question. You said at
15 the beginning of your testimony that the first time you
16 learned about -- I didn't write it down, but let me ask you
17 about it. You said something about the first time that you
18 learned about someone who was positive for COVID had come from
19 China to New York; is that right? That was in January?

20 THE WITNESS: Yeah, what happens is we have a system
21 in place where physicians can call us any time day or night if
22 they suspect an urgent emerging disease, I'm at the top of
23 that list to get those phone calls. The first call I got was
24 January 22nd, and I got five of them that night because that
25 was Washington State had reported their first positive case

1 that day.

2 So we obviously had a number of physicians seeing
3 people from China in emergency rooms in New York State making
4 phone calls and saying hey, might this be that particular
5 disease, how can I get a person tested. So that's what I am
6 referring to.

7 The first real case that we wound up seeing in New
8 York, I think as we all know, was just about March -- it was
9 like February 29, March 1 or so.

10 THE COURT: Was there any contact tracing to
11 indicate where that person had come from?

12 THE WITNESS: So the very first case that we saw in
13 New York State was somebody from New York City who had
14 traveled to -- I want to say it was Iran. But the second
15 case, which was the one in New Rochelle, which led to the
16 much, much larger outbreak, there was a lot of contact tracing
17 there. We know that was a superspreader event that happened
18 in association with what appeared to be a religious
19 celebration, you know, there were people who were not part of
20 the community but were there doing things like catering, so
21 forth and so on, all tested positive.

22 THE COURT: But the contact tracing didn't indicate
23 where that originated, whether it was Iran or China, or
24 somewhere else?

25 THE WITNESS: Correct. Right. At that point in

1 time I don't know -- I'm sorry?

2 THE COURT: Go ahead.

3 THE WITNESS: So I don't believe that there --
4 sometimes it feels like forever ago at this point. So I don't
5 recall that we have been able to, you know, identify where
6 that very first case in New Rochelle -- you know -- what their
7 link was or how they were exposed.

8 THE COURT: And when was the time that you had a
9 case that was reported to you that originated in Europe, if
10 you remember?

11 THE WITNESS: Oh, boy. I can't tell you that it
12 would be the very first one, but I definitely remember a
13 person from Ulster County who had recently returned to the
14 United States. We found him -- we didn't find him. That's
15 the wrong way to say it. He presented symptomatic after
16 spending two weeks in France. I'm sure there were others
17 before that, but that was -- that's the first recollection I
18 have of one that I personally worked on with the individual.

19 THE COURT: Thank you very much.

20 Anything else, Mr. Farber?

21 MR. FARBER: Not from me, Your Honor. Thank you.

22 THE COURT: Okay. I hate to ask, Mr. Mastro, do you
23 have anything else?

24 MR. MASTRO: Well, if Your Honor would indulge me
25 for just a few minutes, I promise to be very brief.

1 THE COURT: Go ahead.

2 MR. MASTRO: Thank you.

3 RECROSS-EXAMINATION

4 BY MR. MASTRO:

5 Q Sir, am I correct that you are aware of spread of COVID
6 within the ultra orthodox community in Brooklyn; correct?

7 A That's been well reported, yes.

8 Q But you are not aware of any evidence of the spread of
9 COVID from the ultra orthodox community to the diocese's
10 churches in Brooklyn and Queens; correct?

11 A I am not privy to the contact tracing that's been being
12 done by the New York City Health Department, so I don't know
13 if there are New York City residents who may go to these
14 churches who may have, you know, worked with someone in the
15 orthodox community or something like that, so I can't answer
16 that.

17 Q Sir, a simple question: You're not aware of any evidence
18 of spread of COVID from the ultra orthodox community to the
19 diocese's churches in Brooklyn; correct?

20 MR. FARBER: Objection.

21 THE COURT: He may answer. Go ahead.

22 A I'm not aware, but it doesn't mean it doesn't exist.

23 Q Now, sir, you said -- you talked about some important
24 factors in connection with enterprises, businesses, essential
25 businesses that are allowed to stay open without any capacity

1 restriction. You talked about the time that someone spends in
2 a store. Do you remember that, sir?

3 A I do. Yes.

4 Q And I respectfully suggest to you that in forming the
5 question, but my wife is going to be part of these
6 proceedings, that there are people who go to Target and spend
7 hours, they shop, they clothes shop, they food shop, they do
8 all sorts of stuff at Target, and they spend hours?

9 MR. FARBER: Objection.

10 THE COURT: I'm sorry, the Court will take judicial
11 notice of the fact that people who go shopping at big box
12 stores sometimes browse through the store for a long period of
13 time. It's a form of recreation for some people and sometimes
14 don't even buy anything. So let's move on.

15 Q Sir, the catholic churches and the dioceses have actually
16 limited the time of the mass so that parishioners spend less
17 time in the churches. You are aware of that; right?

18 A From earlier testimony.

19 Q And you talked about your concern about singing and
20 chanting. Are you aware that the diocese is prepared to
21 eliminate choirs and parishioners singing and having the
22 cantor removed at least 12 feet from anyone else in the
23 cathedral? You heard that testimony; right, sir?

24 A I heard that about singing. I was born and raised a
25 catholic as well. I mean, I know that there are many times in

1 the mass where the -- where parishioners are reciting prayers
2 out loud. I don't know if that has been changed or not.

3 Q And then they have been limiting the time in church,
4 according to the testimony you heard earlier; correct, sir?

5 A Correct.

6 Q You talked about arrows on the ground at certain of these
7 big box stores. You know that the catholic church is doing
8 that to make sure of social distancing, sitting every other
9 row, and sitting at least six feet apart in a row, and arrows
10 on the ground? You heard that testimony earlier; right, sir?

11 A I did.

12 Q And, sir, isn't it the case that you know in the catholic
13 churches they are rigorously enforcing the mask requirement
14 and social distancing? And you heard the testimony that
15 people have to leave if they don't? And you heard that
16 testimony; correct?

17 A I did hear that testimony.

18 Q Now, sir, you talked about how long somebody is in a
19 place. Well, all of those businesses, likes the banks and the
20 accounting firms and the brokers, the employees in confined
21 spaces are going to work 8:00, 9:00 in the morning until 5
22 o'clock in the afternoon, and customers are coming out and
23 into their offices in that confined space over the course of
24 that eight-or nine-hour day; isn't that right, sir?

25 A It is. I mean, to the -- you know -- I'm sure there are

1 some working virtually. I'm sure there are some who may be in
2 the office working full shifts.

3 Q And there is no restriction on capacity in any of those
4 places; right?

5 A Correct.

6 Q And they are essential services; right?

7 A Correct.

8 Q Are you aware any COVID spike or outbreak in any house of
9 worship in a red zone in Brooklyn besides the ultra orthodox
10 community, yes or no?

11 A I'm not aware of any at this particular point in time.
12 New York City may have additional information.

13 MR. MASTRO: Thank you. I have no further
14 questions, Your Honor.

15 THE COURT: Anything else from you, Mr. Farber?

16 MR. FARBER: I'm sorry, I'm getting some weird
17 sound. No, Your Honor, nothing further from me.

18 THE COURT: Okay. All right. Mr. Backenson, thank
19 you very much. You are excused.

20 THE WITNESS: Thank you.

21 THE COURT: Does the defense have any other
22 witnesses?

23 MR. FARBER: I do not at this time, Your Honor.
24 Your Honor has asked for a declaration to be filed by tomorrow
25 morning.

1 THE COURT: Yes, please.

2 I don't want to take comments that are attributed to
3 the Governor at a press conference as accurate and without
4 some further delineation in a declaration and I would not want
5 to rely on it without clarification. That is why I have asked
6 for a declaration as to current state of the positivity rate
7 in the red zone and in the yellow zones. So you understand
8 that we're just trying to be careful not to assume or conclude
9 anything that may not be current evidence.

10 MR. FARBER: Yes, Your Honor.

11 THE COURT: Now, the next step, Mr. Mastro has asked
12 to make a brief closing, and I'm really not sure whether Mr.
13 Mastro wants to do that or make a submission between now and
14 tomorrow morning, but I'm happy to take your comments now.

15 We've had a substantial amount of written
16 submissions and some of these issues depend on the state of
17 the law at the present time.

18 Let me just say this, it's not clear to me what the
19 state of the law will be this month because it is all subject
20 to consideration by the appellate courts, consideration by the
21 appellate courts as to whether a situation like the
22 plaintiff's situation is subject to strict scrutiny analysis.
23 And at present, it would seem that the Supreme Court has
24 basically indicated in *South Bay* by a five to four vote that
25 that a strict scrutiny should not be applied to a free

1 exercise claim here. But I don't know what will be the case
2 if this case -- whatever I decide -- goes up to the Second
3 Circuit, and potentially some case goes to the Supreme Court
4 in the next month or two. So I'm just a little concerned that
5 whatever I do is going to be the subject of appellate review
6 and the rules may change depending on the composition of a
7 panel on the Circuit Court or the composition of the Supreme
8 Court.

9 So, Mr. Mastro, I would want to hear from you
10 whatever you have to say now briefly. But I would also say to
11 the State that if the circumstances have improved, I would ask
12 to know whether the State is planning to revise the parameters
13 of the limitations that it has placed on religious worship in
14 the zones, the red, the orange, and yellow zones. I would
15 like to know that as well from the State. If the State's
16 position is it's going to continue with those restrictions,
17 you can put that in your declaration tomorrow morning as well,
18 so at least we know where we are as of now.

19 The defense witness indicated that the current rules
20 for these hot zones, if you will, were predicated on what
21 happened last month. It appears that the situation has
22 improved, but whether it has improved sufficiently to permit a
23 revision of the rules is something that I would like the State
24 to opine on between now and tomorrow morning.

25 Do you understand that, Mr. Farber?

1 Mr. Farber? Mr. Farber?

2 THE COURTROOM DEPUTY: We lost him, Judge.

3 THE COURT: When did we lose him?

4 THE COURTROOM DEPUTY: We lost him a couple of
5 minutes ago.

6 THE COURT: At what point in my statement and to the
7 parties did we lose him?

8 THE COURTROOM DEPUTY: It was right at the end,
9 Judge. I saw him.

10 THE COURT: Let's wait for him to come back and then
11 I will repeat the request.

12

13 (Pause in proceedings.)

14 (Continued on the following page.)

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1 (Continuing)

2 MR. FARBER: Your Honor?

3 THE COURT: Yes, Mr. Farber, how are you?

4 MR. FARBER: I apologize. For some reason, I am
5 muted. I still hear the Court but the Court doesn't hear me.

6 THE COURT: Did you hear my request regarding any
7 changes that might be under consideration for the rules
8 regarding these three zones?

9 MR. FARBER: I did, your Honor, and we will include
10 that in our submission.

11 THE COURT: All right. Could you give me that by
12 10 a.m. tomorrow morning?

13 MR. FARBER: 10 a.m.

14 THE COURT: 10 a.m. would be fine. And, of course,
15 upon receiving that, the Plaintiff can make a submission, a
16 brief submission, if it wishes, by 1 p.m. tomorrow.

17 I'm sorry, I didn't hear you, Mr. Mastro.

18 THE COURTROOM DEPUTY: You're on mute.

19 THE COURT: I'm reading lips. I think he said yes.

20 (Pause in proceedings.)

21 MR. MASTRO: Can you hear me now, your Honor?

22 THE COURT: Yes, indeed, sir.

23 MR. MASTRO: Thank you so much. Thank you, your
24 Honor, we appreciate that opportunity to comment on what the
25 State submits.

1 I will be really brief now, but I really wanted to
2 address two points your Honor made.

3 THE COURT: Please. Go ahead.

4 MR. MASTRO: First, your Honor's observation about
5 *South Bay*.

6 Respectfully, I don't think *South Bay* affects the
7 issues that exist at this time at all. We are seven months
8 into the period where states have gone through litigation
9 measures and the like. *South Bay* concerned an issue of an
10 extraordinary writ of injunction. That's what the Supreme
11 Court grants sparingly and only in the most critical and
12 exigent circumstances when rights are indisputably clear.

13 And it was at the beginning of the pandemic, a
14 five-to-four decision, and Justice Roberts explained some of
15 the rationale of his concurrence. But I don't have any idea
16 how the Court would break down on these issues today with a
17 track record in place. In fact, many courts have said that
18 you have to base these decisions when you're infringing upon
19 religious rights on the circumstances as they exist and
20 subsequently develop.

21 Early on in the pandemic, the Court was not willing
22 to take up an extraordinary writ of injunction, which is
23 something the Court only does when a TRO has been denied and
24 it's trying to decide whether it's so exigent a circumstance
25 that it should under those circumstances and the Court simply

1 does not do it absent clear error. It's almost like a
2 mandamus situation. Early on in the pandemic, the Court five
3 to four ruled the way it did.

4 But that case and subsequent cases, including the
5 *Elrod* case in the Seventh Circuit, said circumstances change
6 over time. So, what a Court is willing to do at the beginning
7 of the pandemic isn't necessarily what a Court should do
8 today, religious infringement, particularly in a case like
9 this.

10 I refer your Honor specifically to the Sixth
11 Circuit's decision in *Roberts v. Neace*, in which they ruled on
12 more of a record. They ruled that, quote, "While the law may
13 take periodic naps during a pandemic, Courts will not let it
14 sleep through one."

15 And they ruled that the Baptist church there could
16 reopen; with social distancing and mitigation measures, should
17 be allowed to reopen and that its First Amendment free
18 expression rights were being violated.

19 The *Soos* case in the Northern District of New York
20 as well supports this motion. And most recently -- their
21 finding strict scrutiny applies in those cases. And most
22 recently the *Capitol Hill Baptist* case, decided just last week
23 by a District Court in D.C., found strict scrutiny applied and
24 that that Baptist church should be allowed to reopen by
25 implementing the social distancing measures.

1 I respectfully submit to your Honor this testimony
2 today has been elucidating because whether you apply strict
3 scrutiny or rational basis, there is no rational basis for
4 restricting the religious exercise of the Catholic churches in
5 the Diocese as this record is bereft of any evidence, any
6 evidence, that there has been any spread, surge, outbreak of
7 COVID in any of the Catholic churches in the Diocese.

8 The only evidence is of spread and outbreak in a
9 certain community, the ultra-Orthodox Jewish community, and
10 there's no evidence of any spread beyond that community into
11 the Catholic churches. And that's a track record over three
12 plus months and includes September and early October, before
13 the Governor imposed this order.

14 Your Honor, whether you're applying strict scrutiny
15 or rational basis, what is the rational basis for restricting
16 the Catholic churches who have done everything right and had
17 no outbreak and had no surge in COVID from their free
18 exercise?

19 They have been doing everything right. And even the
20 State's witness said that all the things they're doing are the
21 right things for them to do and candidly admitted he and the
22 State is not aware of any evidence, any evidence, of spread
23 into any of the Catholic churches.

24 And your Honor, what is the height of irrationality?
25 The health department didn't write this executive order. The

1 health department didn't decide the cutoffs. The health
2 department didn't decide the hatchet that was put to all
3 houses of worship. It was done in the Governor's office,
4 where there isn't any epidemiologist, scientist, or M.D.
5 involved in the drafting. That's the height of irrationality.

6 First Amendment requires more, your Honor. It
7 requires strict scrutiny. And even if your Honor were to find
8 that that's an open question, I respectfully submit there's no
9 rational basis for this.

10 The Governor's own admissions about the origins of
11 things, who is responsible, and how he approached the problem,
12 writing the executive order himself, no epidemiologist, he
13 took a blunt instrument when you're not allowed to do such a
14 blunderbuss approach when it comes to restricting religious
15 exercise.

16 So, I respectfully submit the hearing has
17 established the record that Judge Komitee said we should have
18 at a preliminary injunction. We have more fully developed the
19 record. We have heard from the State's witness. The State
20 has no evidence to support the restrictions on the Catholic
21 Church. We've heard admissions that it's conceded the
22 Catholic Church is doing everything right and hasn't had any
23 outbreak of COVID in these red and orange zones.

24 And we have heard the words of the Governor himself.
25 There's nothing tailored about this. This is a problem in one

1 community and he's sweeping too broad a brush. And we have
2 heard the Governor in quite graphic terms basically admit a
3 First Amendment violation.

4 So, I respectfully submit, your Honor, and I'll
5 close with this, I know the Attorney General answers to the
6 Governor, and I'm answering to a higher authority. And I am
7 referring to you, your Honor, and referring to a higher
8 religious authority.

9 I am reminded of the immortal words of John Belushi
10 in the Blues Brothers movie, "We're on a mission from God."
11 These people, these Catholics in the Diocese, have done
12 everything right. The City admits that they've done
13 everything right. And the State admits they have had no COVID
14 outbreaks or spread. They simply cannot sweep so broadly
15 under such circumstances under the First Amendment.

16 And even if your Honor thought it was a close
17 question on whether ultimately strict scrutiny were likely to
18 succeed or we met and we have stated a substantial question, I
19 respectfully submit to you that irreparable harm is presumed
20 for the constitutional law, the *Elrod* case, on whether you are
21 infringing on religious freedoms.

22 And on balance of equities, I respectfully submit to
23 you my clients, the Diocese, supported by the Archdiocese and
24 these Catholic churches and parishioners, your Honor, this is
25 vital to their life, their spirit, their soul, to be able to

1 go to Mass.

2 And the government doesn't have an interest in doing
3 something that's unconstitutional. And when it does something
4 to infringe on religious liberties, it better have a
5 compelling interest and evidence to show that anything that is
6 happening in those Catholic churches needs to be addressed
7 because of that compelling interest.

8 I respectfully submit this hearing established
9 beyond question that the State cannot possibly meet that
10 burden. And it is ultimately the State's burden. But on a
11 preliminary injunction, our burden, the balance of equities is
12 decidedly in our favor.

13 I will end with this: The Bishop -- I know the
14 Governor cares about people, but nobody cares more about the
15 safety of his parishioners in his Diocese than this bishop and
16 the bishop who testified here today. They have done
17 everything to protect their parishioners; they closed down
18 before the State required them to, they imposed stricter
19 restrictions on themselves than the State required of them.

20 But this is a bridge too far. The Governor has gone
21 too far by not recognizing that he should be enforcing and
22 using the health department's enforcement mechanism that this
23 witness admitted they have to go after the real problem. He's
24 painted with too broad a brush. Can't do that to these
25 churches. You can't do that to all houses of worship when

1 there's no evidence of a problem there and they're doing all
2 the things the right way. Whether it's strict scrutiny or
3 rational basis, there was none for what the Governor did here.

4 And we implore you, we pray, that our clients will
5 be able to go back to Mass this Sunday.

6 Thank you, your Honor.

7 THE COURT: Thank you.

8 Mr. Farber?

9 MR. FARBER: Thank you, your Honor.

10 Your Honor, this very proceeding that we are
11 proceeding, you know, by Zoom demonstrates that we are in very
12 fraught times. New York, through the heroic measures of first
13 responders, emergency service personnel, medical personnel,
14 government officials, and, most importantly, the people of the
15 State, have successfully brought down COVID-19 infections in
16 the State to a low level, hovering around one percent or less
17 most of the time.

18 The price of liberty and the price of maintaining
19 COVID is eternal vigilance. There are outbreaks in particular
20 geographic regions. Whether or not those outbreaks can be
21 attributed as a fault matter to a given community is
22 irrelevant here. The virus doesn't care whose fault it is.
23 The virus cares that there are people around capable of
24 spreading the virus.

25 And if Catholic churches are in a neighborhood with

1 a high incidence of virus, basically what the Plaintiff is
2 asking here is to be permitted to bring -- I think their
3 evidence is some of their churches hold well over a thousand
4 people -- hundreds of people together, whether or not they are
5 spread out with masks, whether or not there are other
6 measures.

7 This is risk mitigation. And, so, the question from
8 the community standpoint is, is a temporary measure -- the
9 executive order itself runs to November 2, there's language in
10 there it will be reconsidered within a couple of weeks -- is a
11 temporary measure under these circumstances appropriate here?

12 Under the *Jacobsen* standard, there is no question.
13 As the Supreme Court said, the community has the right to
14 protect itself against an epidemic of disease which threatens
15 its members. And in such times, judicial scrutiny is reserved
16 for measure that has no real or substantial relation to the
17 object of protecting the public or is beyond question of
18 plain, palpable invasion of rights secured by the fundamental
19 law.

20 There is no question that the objective of Executive
21 Order 202.68 is to protect the public, to hopefully stop this
22 cluster and spread, to get the statewide cases down again.
23 That's what this is about.

24 It simply does not matter that some people are
25 behaving in riskier manners than others. Basically, this is a

1 legislative judgment and the State is imposing a reasonable
2 health measure. The fact is, the measure is temporary, it's
3 confined to limited areas; as the witness testified to, that
4 he recognized as those areas containing the higher COVID
5 rates.

6 So, you know, this law has been the law of the land
7 between *Jacobsen* in 2020 through *South Bay* at the end of May
8 of this year. I might add that *South Bay* was decided several
9 weeks after the *Roberts* case that Mr. Mastro was referring to.
10 I might add also that the *Capitol Hill* case he was referring
11 to was an RFRA case, not applicable here.

12 But, in any event, that long line of cases, all the
13 way through a case called *Agudath Israel*, in which Judge
14 Matsumoto, of this court, applied the *Jacobsen* standard to the
15 very executive order here because we understand no one is
16 disputing the importance of the right -- the First Amendment
17 rights and the free exercise rights here. But in this case,
18 the risk to the community of permitting the size of the
19 gathering that the Plaintiff is seeking presents a risk that
20 the State is undertaking mitigation.

21 As we argued in our papers -- I'm not going to
22 belabor that point, but in this case, comparable secular
23 conduct is not treated more harshly. In fact, in the red
24 zones, all other gatherings except in the essential businesses
25 are banned. So, admittedly, 10 or 25 people is a small

1 gathering, but religion and religious activities are not being
2 discriminated against.

3 Further, the lines were drawn narrowly to reflect
4 where the outbreaks are. We would argue, as we argued in
5 papers -- again, I'm not going to belabor that -- even if
6 strict scrutiny applies, Plaintiff's claims would still fail.

7 But, again, this is an injunction application by
8 Plaintiff. It's a mandatory injunction against the
9 government. They have to prove probability of success on the
10 merits, they have to prove irreparable harm, they have to
11 prove balance of the equities, and that the public interest
12 favors this release all by a heightened standard. And the
13 fact of the matter is they haven't.

14 The fact is what they are proposing, to reopen
15 churches in the middle of hot spots in a pandemic zone, taking
16 hundreds of people, presents an unreasonable risk in the view
17 of the government as a matter of public health and safety.
18 The government is acting here.

19 So, the question, as I understand, there will be a
20 disruption in people's religious practices. The
21 counterbalance to that is the health and safety of the
22 community. And, you know, as we've learned too tragically
23 from earlier this year, this disease, if it gets a foothold,
24 can spread rapidly and throughout the state. That's what
25 we're trying to avoid. That is the Governor's interest here.

1 Thank you, your Honor.

2 THE COURT: Thank you.

3 Apparently, the Governor said today that the
4 Orthodox community is not following the red zone rules. And
5 I'm wondering at what point the balance will shift from the
6 general rule that you articulate regarding the responsibility
7 of the government to protect the public health to a situation
8 where if a particular part of the community doesn't follow the
9 rules, whether -- I'm going to say a victim of another's
10 negligence or misconduct is forced to have their
11 constitutional right of free exercise of religion restricted
12 by the fact that there's another part of the community that is
13 not following the rules and apparently the government is not
14 able to force that part of the community to follow the rules.

15 There has to be a tipping point here where you can
16 enter a church under these restrictive procedures in a
17 neighborhood where others are not following the rules. I'm
18 wondering when that point is reached and who is going to
19 enforce the rules in such a way that the Plaintiff here can
20 restore activities in these churches if the Court finds for
21 the State. And that's a problem that I don't think we've had
22 an opportunity to talk about here today.

23 Mr. Mastro would like to say something, then I'll
24 get one more comment from Mr. Farber, and we'll wind it up.

25 Mr. Mastro, briefly.

1 MR. MASTRO: Thank you, your Honor.

2 You went right to the heart of it. The State's
3 witness testified that the State has the authority to enforce,
4 it knows where the problem is in the ultra-Orthodox community,
5 and, yet, he said he's not aware of any efforts to have
6 enforced in that community. That's where the government
7 should be focusing its attention.

8 And, of course, under strict scrutiny, its
9 blunderbuss approach of all houses of worship is the
10 antithesis of a narrowly tailored approach in enforcement.

11 But your Honor, I have to address this because
12 Mr. Farber keeps misstating the holding in *Jacobsen*. The
13 holding in *Jacobsen* was that a state has discretion to protect
14 public health and safety but, but, quote, "subject, of course,
15 to the condition that no rule prescribed by a state shall
16 contravene the Constitution of the United States nor infringe
17 any right granted or secured by that instrument," end quote.
18 That's on Page 25 of *Jacobsen*. He always leaves that out.

19 This is that case. This is that case where the
20 State isn't enforcing where it should be and painted with too
21 broad a brush. And it's entirely irrational to invade the
22 religious liberties of the Catholic Church.

23 And this isn't -- and I have to correct Mr.
24 Farber -- this isn't a mandatory injunction, this isn't a
25 heightened standard. It's a prohibitory injunction. The

1 Governor and the State shouldn't be enforcing those twelve
2 words that go too far.

3 Yes, the Catholic Church will do the 25 percent it
4 has been doing. We'll do that even in orange and yellow
5 zones. That's what it's been doing even though it could be
6 substantially more. It's that it is only 10 and only 25 in a
7 red and orange zone. In a Catholic church, that's basically
8 shutting the door. What's the priest supposed to do, say
9 after the ninth parishioner, "No one else can come in and
10 enjoy the Holy Sacrament and the Mass"?

11 Your Honor, without any evidence of any problem in
12 any of those churches in all this time and the churches doing
13 everything right, as the State admits, I come back to where I
14 started, which is it doesn't help them. And this is already
15 the circumstance where the State hasn't exercised its
16 authority properly and it hasn't enforced where it should be
17 enforcing. And the Governor is still to this day talking
18 about the real problem as the Orthodox community.

19 Well, where's the enforcement there? Where's the
20 enforcement? Where are the fines?

21 On the face of the executive order, it says \$15,000
22 an offense. Go in there with your --

23 THE COURT: I hate to do this, Mr. Mastro.

24 MR. MASTRO: Sorry, your Honor.

25 THE COURT: There's an article in today's Wall

1 Street Journal entitled, "Cuomo threatens to withhold funds
2 from New York City, other COVID-19 hot spots," and there is a
3 paragraph in here that indicates that, quote, "Last weekend,
4 New York City authorities gave out more than 100 summonses in
5 State-designated restricted zones for a variety of violations,
6 including holding mass gatherings. Officials said they issued
7 more than \$150,000 in fines," end quote.

8 So, efforts are being made according to this
9 article, which I take notice of just in connection with what
10 you just said.

11 MR. MASTRO: Yes.

12 THE COURT: But the question is, my question is,
13 whether a \$15,000 fine is going to cause people to change
14 their behavior in large groups. That remains to be seen. But
15 I appreciate you're mentioning that.

16 MR. MASTRO: I appreciate that, your Honor. And I
17 wasn't suggesting there hasn't been any enforcement at all.

18 It happens to have happened after this latest
19 executive order for the first time. By the City, not by the
20 State. It should have happened before this executive order
21 and it's what should have been done repeatedly in weeks of
22 September leading into October if they're trying to address
23 the problem where it really occurs.

24 It doesn't change, your Honor --

25 THE COURT: I understand your point.

1 MR. MASTRO: The Catholic churches have done
2 everything right and they don't have any outbreak or spread.
3 They don't. And they didn't into early October. Zero.

4 So, how do you punish them for what's happening in
5 another community when there's no evidence of spread from that
6 one community into these other churches?

7 It's not right. The First Amendment says you
8 shouldn't do it, whether it's strict scrutiny or rational
9 basis.

10 Thank you, your Honor.

11 THE COURT: Thank you.

12 Mr. Farber, anything to close this out?

13 MR. FARBER: Your Honor, this is not about
14 punishment, this is not about fault finding. This is about a
15 relentless little virus who really doesn't care whose fault it
16 is. This is about protecting the entire public, the over
17 19 million people in the State of New York, many of whom are
18 parishioners of the Diocese.

19 The fact is this is a public health measure. It is
20 temporary, it is narrowly drawn, it will be revisited by its
21 own terms based on the data. If the State is successful in
22 crushing this cluster, then it will be modified sooner. If
23 things develop the other way, then other methods will be taken
24 by the government to protect the public health. There's a
25 long line of authority that the State can do that.

1 Thank you, your Honor.

2 THE COURT: You will concede, sir, that if the
3 Orthodox community had followed the same protocols as the
4 Diocese of Brooklyn followed in terms of holding its services
5 and following the protocols that have been described by the
6 two witnesses for Plaintiff that we wouldn't be here having
7 this discussion probably, would we?

8 MR. FARBER: Probably, your Honor? You know, again,
9 I don't know.

10 It is well established that these are where the
11 clusters are. You know, we assume that some people are
12 engaging in riskier behaviors in large numbers in these
13 communities. But, again, whether -- regardless, again, as I
14 say, regardless of fault or not fault or just happenstance,
15 whether it is or not, the Government's interest is in
16 protecting the entire community. Sometimes in a case like
17 this, maybe it has to protect them as a result of some
18 people's actions. That's not unprecedented. But that's what
19 the government is doing here.

20 So, you know, with respect to the long line of
21 *Jacobsen* cases, the government is entitled to a rational basis
22 review, and what the government is doing here is rational.

23 Thank you, your Honor.

24 THE COURT: All right, everybody, thank you very
25 much for your attention today. The Court reserves decision

1 and will await the additional materials that it has requested
2 for tomorrow.

3 Have a good evening, everyone. Good to see you all.

4 (A chorus of thank yous.)

5 MR. MASTRO: I really, really appreciate all the
6 time and consideration. Thank you, thank you, thank you.

7 MR. FARBER: Good night. Thank you.

8 THE COURT: Good night, everybody. Stay safe.

9
10 (Matter concluded.)
11
12

13 *We certify that the foregoing is a correct transcript from*
14 *the record of proceedings in the above-entitled matter.*

15 /s/ Linda A. Marino
16 *LINDA A. MARINO*

October 16, 2020
17 *Date*
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